(23,187)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 632.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

C. B. KENNEDY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1912.

* * * * * * *

1–81 And afterwards, to wit: on the same day, an abstract was filed, which in words and figures is as follows, to-wit:

82 In the Supreme Court of the State of South Dakota, April Term, A. D. 1910.

2853.

C. B. KENNEDY, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendant and Appellant.

Appeal from Circuit Court of Lincoln County, South Dakota, Hon. Joseph W. Jones, Presiding Judge.

Abstract.

Charles E. Vroman, of Counsel.
William G. Porter, Attorney for Defendant and Appellant.

Supreme Court, State of South Dakota. Filed Nov. 4, 1909. Frank Crane, Clerk.

83 In the Supreme Court of the State of South Dakota, April Term, A. D. 1910.

C. B. KENNEDY, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendant and Appellant.

Abstract.

The plaintiff in his complaint, states his cause of action as follows:

Complaint.

Now comes the plaintiff in the above entitled action and for his complaint states to the Court:

I.

That the defendant is a corporation duly organized and existing and has so been organized and existing for many years last past and has complied with the laws of the state of South Dakota
84 with reference to doing business therein and is duly qualified and authorized to sue and be sued in this state.

II.

That the business of the defendant is the owning and operation of steam railways for the transporation of passengers and freight from point to point in this state and also outside thereof.

III.

That on the thirteenth day of October, A. D. 1908, the plaintiff was, and still is, the owner of the northwest quarter of section twenty-eight, in township ninety-nine, of range forty-nine, in Lincoln county, South Dakota, and owned the same for many years last past.

IV.

That the defendant has builded a railroad across the said land diagonally from the southeast to the northwest and on the said 13th day of October, A. D. 1908, owned and operated the said road and owned and operated locomotive steam engines for the running and propelling of its trains and cars. That the said engines carried fire for the generation of steam for the purposes of power. That the right-of-way of the defendant was a strip of land one hundred feet wide, fifty feet on each side of the center of the track.

V.

That adjoining the right-of-way of the defendant on the
85 east and on the land of the plaintiff, the plaintiff had a good timothy and clover meadow in first-class condition, and containing sixty acres. That the plaintiff had cut the hay crop on the said land in the fore part of July, 1908, and stacked on the said land and there was stacked on the said land and on the said meadow at least one hundred and twenty tons of hay, the property of the plaintiff.

VI.

That on the 13th day of October, A. D. 1908, the defendant was the owner of the said railway across the land of the plaintiff on its said right-of-way, and was operating locomotive engines carrying fire for the production of steam and it negligently allowed fire to escape therefrom which was communicated directly to the meadow of the plaintiff and burned over the same and burned at least sixty tons of the plaintiff's hay. That on the said meadow so burned over, there was a second crop of clover standing which was in good condition and was a good crop, all of which was destroyed by the said fire.

VII.

That the defendant was negligent in that its engine which caused the said fire was not properly constructed so to prevent the escape of sparks and was out of repair, and the screens for the prevention of the escape of fire and sparks were out of repair to such a
86 degree that sparks escaped therefrom and flew over the right-of-way of the plaintiff and set fire to the meadow and grow-

ing clover crop and stacked hay of the plaintiff. That on the defendant's right-of-way was large quantities of dry, dead grass, and other combustible rubbish allowed by the defendant to accumulate; that the engine of the defendant so carelessly constructed and out of repair, set fire to said dead grass and rubbish on the defendant's right-of way and the defendant carelessly and negligently allowed it to escape therefrom and to spread on to the meadow of the plaintiff and to burn the same together with his hay and second crop of clover.

That the defendant was generally negligent in the operation of its said engine touching the escape of fire but this plaintiff cannot specify all the particulars thereof, but they are known to the defendant as the plaintiff is informed and believes.

VIII.

That the plaintiff was damaged by reason of the setting fire to his meadow by the defendant as follows: That his meadow has been totally destroyed, as he is informed and believes; that the roots of the grass has been exposed to the winter cold, and freezing, and winds and will no longer be valuable to the plaintiff as meadow, to the plaintiff's damage of two hundred and fifty dollars. That
87 the plaintiff's second crop of clover standing on the said land at the time it was burned was a good fair crop, and was of the reasonable value of two hundred fifty dollars. That the said fire burned and destroyed at least sixty tons of the plaintiff's hay stacked on the said land as aforesaid, and of the reasonable value of three hundred dollars, as the plaintiff is informed and believes, making a total damage of eight hundred dollars suffered by the plaintiff by reason of the fire set by the engine of the defendant as aforesaid.

IX.

That on the 16th day of October, A. D. 1908, the plaintiff notified the defendant in writing that the said loss had occurred and accompanying the said notice and attached thereto the plaintiff served his affidavit thereof in writing. That he served the said notice and accompanying affidavit on J. A. Files, the station and ticket agent of the defendant at Canton, Lincoln county, South Dakota, in the county in which the said loss occurred, and service was made on him at the depot of the defendant, and while the said J. A. Files was in the performance of his duties as such agent of the defendant, all as required by the provisions of Chapter 215 of the Session Laws of 1907 of the legislature of the state of South Dakota.

X.

That more than sixty days have elapsed and passed since
88 the service of the said notice and affidavit, and the defendant has neither paid or settled the said loss as provided by said Chapter 215 of the Session Laws of 1907, and the plaintiff brings this action under the said section and chapter and claims to recover double the amount of his damages as stated.

Wherefore, The plaintiff demands judgment against the defendant for sixteen hundred dollars, and for his costs and disbursements as by law provided.

C. B. KENNEDY,
Plaintiff and Attorney per se.
A. R. BROWN,
Attorney for Plaintiff.

Which said complaint is duly verified by plaintiff.

To which complaint the defendant, by leave of the Court first had and obtained, served and filed the following Amended Answer.

Amended Answer.

The above named defendant answering plaintiff's complaint in the above entitled action, states and alleges as follows:

I.

That it denies each and every allegation, matter, and statement in said complaint contained, except as hereinafter expressly admitted, or qualified.

89

II.

That defendant admits that it now is and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, for the purpose of constructing, owning, and operating a railway in the states of Wisconsin, Iowa, South Dakota, and elsewhere, and was at the time mentioned in said complaint a common carrier of passengers and freight; that prior to October 13th, 1908, it had acquired a right-of-way across the premises described in said complaint and had constructed a line of railway thereon, and upon said date was operating locomotives propelled by steam upon said line of railway.

III.

That defendant specifically denies that on the 13th day of October, 1908, it allowed sparks and fire to escape from its locomotive and set fire to plaintiff's meadow, growing clover crop, and hay situated upon the premises described in the complaint; denies that its locomotive was not properly constructed, out of repair, and not skillfully managed; denies that it allowed dead grass and other combustible rubbish and materials to accumulate upon its right-of-way across the premises described in the complaint; denies that its engine or

90

locomotive set any fire upon its right-of-way at the time and place alleged in the said complaint, nor that fire was allowed to escape from defendant's right-of-way and onto the meadow of the plaintiff and to burn the same, together with his hay and second crop of clover thereon, as alleged in said complaint.

IV.

That it specifically denies that plaintiff suffered damages in the sum of eight hundred dollars ($800), as alleged in the eighth paragraph of said complaint, or in any other sum, or at all.

V.

That said defendant further answering the complaint of plaintiff, and for an affirmative defense, states and alleges, as follows:

That Chapter 215 of the Session Laws of the state of South Dakota for the year 1907, under which plaintiff seeks to recover double damages and damages double in the amount of those actually sustained, is unconstitutional, null, and void. That the said law referred to in paragraphs nine and ten of plaintiff's complaint, and the provisions thereof, and the whole of said law, to-wit: Chapter 215 of the Session Laws of 1907 of the state of South Dakota are, on the face of the said law, unconstitutional, null and void, in this:

1st. That said law and its provisions are in violation of and repugnant to Sections 2 and 18, Article 6, of the Constitution of the state of South Dakota.

91 2nd. That plaintiff seeks to deprive defendant of its property without due process of law.

3rd. That said law denies to defendant the equal protection of the laws.

4th. That said law is repugnant to the fourteenth amendment to the constitution of the United States, and that plaintiff seeks thereunder to deprive defendant of its property without due process of law.

5th. That said law and the provisions thereof are repugnant to the fourteenth amendment of the Constitution of the United States, and that thereunder defendant is denied the equal protection of the laws.

6th. That the enforcement thereof will amount to the taking of defendant's property without just compensation and is in violation of the protection guaranteed to the defendant by the fourteenth amendment to the Constitution of the United States.

That the plaintiff, if he recovers anything at all as actual damages, is not entitled to recover double the amount of such damages, the said law, under which said double damages is sought to be recovered, being unconstitutional, null, and void.

Wherefore, Defendant demands judgment that this action
92 be dismissed, and that defendant have and recover of plaintiff its costs and disbursements herein.

WILLIAM G. PORTER,
Attorney for Defendant.
CHARLES E VROMAN,
Of Counsel.

Which said answer is duly verified.

That on the 10th, 11th, and 12th days of February, 1909, said action was duly tried by the Court and a jury duly and legally empaneled, and the following proceedings were thereupon had:

Bill of Exceptions.

The issues in the above entitled action coming regularly on for trial at the February, 1909, term of the above entitled Court, and having been tried therein on February 10th, February 11th, and February 12th, 1909, before the Honorable Joseph W. Jones, Judge, presiding, and a jury duly and legally empaneled and sworn to try the issues of said action, the plaintiff appearing in person and by his attorney, Arthur R. Brown, and the defendant appearing by its attorney, William G. Porter, and the following proceedings were then and there had:

It was Ordered by the Court that all the rulings by the said Court made during the trial of the said action should be deemed excepted to.

The plaintiff thereupon introduced the following evidence
93 in support of the allegations contained in his complaint:

Plaintiff offers in evidence exhibit "B" G. M. H., being notice served on the station agent at Canton, Lincoln county, South Dakota, and affidavit. Offer the affidavit attached to it.

Defendant objects upon the following grounds: That the notice is insufficient as well as the affidavit, and that the same does not state facts sufficient to constitute a notice under Chapter 215, Session Laws 1907, state of South Dakota. Defendant further objects to this offer upon the ground that Section 2 of said Chapter 215 of said Session Laws is unconstitutional and void. That said section and said chapter is in violation of Sections 2 and 18, of Article 6, of the Constitution of the state of South Dakota; and further that said section authorizes plaintiff to deprive defendant of its property without due process of law. Further that said law denies to the defendant equal protection under the laws. Further that it is repugnant to the 14th amendment to the Constitution of the United States. That the plaintiff seeks thereunder to deprive defendant of its property without due process of law. Further, that the enforcement of such section would amount to taking the defendant's property without just compensation and would be in violation of the
94 protection guaranteed to the defendant by the 14th amendment to the Constitution of the United States. And that the same is irrelevant and incompetent and not properly within the issues in this case, and is not binding on the defendant.

Objection overruled. To which ruling the defendant excepted which exception was duly allowed.

D. S. WALDO, being sworn on behalf of the plaintiff testified as follows:

Direct examination by Mr. KENNEDY:

I live at Canton. C. B. Kennedy gave me the notice, Exhibit "B" to serve on the station agent at Canton. I served it the same day he gave it to me. That was the 15th day of October; I served it on Files, the agent of the Milwaukee company. I knew he was

the agent of the Milwaukee company here, at Canton, Lincoln county, South Dakota. I left that notice with him.

Plaintiff's Exhibit "B" was thereupon received in evidence, which said exhibit is in words and figures as follows, to-wit:

STATE OF SOUTH DAKOTA,
County of Lincoln, ss:

CANTON, *October 15th*, 1908.

To the Chicago, Milwaukee and St. Paul Railway Company:

Please take notice, that on the 13th day of October, A. D. 1908, a fire set by your trains destroyed sixty tons of fine timothy
95 hay on the northwest quarter of section 28, in township ninety-nine, of range forty-nine, in Lincoln county, South Dakota, and also destroyed sixty acres of second crop clover on the said land, all of which facts are stated in the affidavit following:

C. B. KENNEDY.

STATE OF SOUTH DAKOTA,
County of Lincoln, ss:

I, C. B. Kennedy, being first duly sworn, depose and say, that on the 13th day of October, A. D. 1908, I was, and am still and for a long time previous was, the owner of the northwest quarter of section twenty-eight, in township ninety-nine, of range forty-nine, in Lincoln county, South Dakota.

That on the said 13th day of October, A. D. 1908, I was the owner and had stacked on the said land, sixty tons of choice timothy hay of the reasonable value of five dollars per ton, amounting to three hundred dollars. That I also had on the said land sixty acres of second growth clover, valuable for seed. That a fire caused by the engines of the said railroad company destroyed the said sixty tons of hay causing me a damage of $300, and also destroyed the said second crop of clover on said sixty acres, and also destroyed the meadow, damaging the deponent in the sum of two hundred and fifty dollars; making a total loss to me caused by said fire of $550 for which I demand payment.

C. B. KENNEDY.

96 Subscribed and sworn to before me this 15th day of October, A. D. 1908.

HANS ANDERSON,
[SEAL.] *Notary Public.*

Thereupon further evidence was introduced by the respective parties touching upon matters not involved in this appeal; and such proceedings were had that on the 11th day of February, A. D. 1909, said cause was submitted to the jury empaneled and sworn to try said cause.

Thereafter and on the 12th day of February, 1909, the said jury duly returned in open Court their verdict, which was received, read, and filed and recorded in the minutes of said Court:

Said verdict is, in words and figures, as follows, to-wit:

Verdict.

STATE OF SOUTH DAKOTA,
County of Lincoln, ss:

In Circuit Court, Second Judicial Circuit.

C. B. KENNEDY, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL R. R. Co., Defendant.

We, the jury, find for the plaintiff on all issues, and assess his damages at one hundred dollars.

S. C. BONINE,
Foreman.

That thereafter, and on the 6th day of April, 1909, the plaintiff served upon defendant's attorneys a motion for judgment
97 upon the verdict, and notice of said motion, which motion and notice are as follows, to-wit:

STATE OF SOUTH DAKOTA,
County of Lincoln, ss:

In Circuit Court in and for the said County.

C. B. KENNEDY, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL R. R. Co., Defendant.

Motion for Judgment on the Verdict.

Now comes the plaintiff in the above entitled action and shows the Court that the above entitled action is one to recover damages caused by the defendant by reason of its locomotive setting fire to the plaintiff's hay and destroying the same.

That the said action came on for trial at the February term, 1909, of the said Court before the Court and a jury on the 11th day of February, A. D. 1909, and on the 12th day of February, A. D. 1909, the jury returned a verdict in favor of the plaintiff on all the issues made by the pleadings, in the sum of one hundred dollars, which verdict was duly entered in the minutes of the Court and duly filed as a part of the judgment roll in the case.

That in the plaintiff's complaint it was alleged that the plaintiff had served written notice on the station agent of the defendant at Canton, in Lincoln county, South Dakota, of his loss accompanied with the plaintiff's affidavit of the said loss and before the commencement of this action.

98 That more than sixty days elapsed after the service of the said notice accompanied by the plaintiff's affidavit of loss and before the commencement of this action and the defendant neglected

and refused to pay said damages, and no part thereof had been paid, which facts were denied by the defendant in its answer, and the finding of the jury on the said issue in its verdict was in favor of the plaintiff; and by reason of the provisions of Chapter 215 of the Session Laws of the legislature of the state of South Dakota for the year 1907, the plaintiff is entitled to recover of the defendant the sum of double the amount of the said verdict.

Wherefore, The plaintiff moves the Court for judgment for the sum of two hundred dollars damages against the defendant, together with his interest on the verdict and his costs.

A. R. BROWN,
C. B. KENNEDY,
Attorneys for the Plaintiff.

To the Above Named Defendant and to William G. Porter, Its Attorney:

You will take notice that the plaintiff will bring on for hearing the above motion before the Court, at its chambers, in the court house, in the city of Sioux Falls, in Minnehaha county, on Wednesday, the 14th day of April, 1909, at eleven o'clock in the
99 forenoon of the said day, or as soon thereafter as counsel can be heard.

A. R. BROWN,
C. B. KENNEDY,
Attorneys for Plaintiff.

Due service and receipt of copy admitted this 6th day of April, A. D. 1909.

WILLIAM G. PORTER,
Attorney for the Defendant.

Thereafter, and on the 28th day of May, A. D. 1909, plaintiff's said motion for judgment on the verdict, and for double the amount of said verdict, came regularly on for hearing before the Court, pursuant to stipulation and agreement of the parties in open Court, the plaintiff appearing in person, and by his attorneys, A. R. Brown and C. B. Kennedy, and the defendant appearing by its attorney, William G. Porter.

The defendant thereupon objected to the granting of said motion upon the following grounds:

1. That the alleged notice and affidavit served by plaintiff on defendant's depot agent at Canton, South Dakota, more than sixty days prior to the commencement of this action, in which he sought to give defendant notice of his loss, fix the amount of his damage, and demand payment of the same, is wholly insufficient to authorize and entitle plaintiff to the double damages provided for
100 by Chapter 215 of the Session Laws of South Dakota for the year 1907.

2. That Chapter 215 of the Session Laws of the state of South Dakota for the year 1907, under which plaintiff seeks to recover double damages and double the amount of the verdict, is uncon-

stitutional, null, and void. That the said law referred to in paragraphs nine and ten of plaintiff's complaint, and the provisions thereof, and the whole of said law, to-wit: Chapter 215 of the Session Laws of 1907 of the state of South Dakota are, on the face of the said law unconstitutional, null, and void in this:

(*a*) That said law and its provisions are in violation of and repugnant to Sections 2 and 18, of Article 6, of the Constitution of the state of South Dakota.

(*b*) That plaintiff seeks, by means of said law, to deprive defendant of its property without due process of law.

(*c*) That said law denies to defendant the equal protection of the laws.

(*d*) That said law is repugnant to the fourteenth amendment to the Constitution of the United States, and that plaintiff's seeks thereunder to deprive defendant of its property without due process of law.

(*e*) That said law and provisions thereof are repugnant to the fourteenth amendment to the Constitution of the United
101 States, in that thereunder defendant is denied the equal protection of the laws.

(*f*) That the enforcement of said law will amount to the taking of defendant's property without just compensation and is in violation of the protection guaranteed to the defendant by the fourteenth amendment to the constitution of the United States.

3. That said Chapter 215 of the Session Laws of the state of South Dakota for the year 1907, is repugnant to and violates the provisions of Section 21, of Article 3, of the Constitution of the state of South Dakota, which provides that no law shall embrace more than one subject, which shall be expressed in its title, and is therefore null and void.

The said motion was thereupon argued by respective counsel and submitted to the Court for its decision.

That thereafter, and on the 29th day of July, 1909, the Court made an order sustaining said motion and granting and rendering judgment in plaintiff's favor for double the amount of the verdict; which judgment was filed in the office of the Clerk of this Court on the 23rd day of July, 1909, and duly recorded in Judgment Book No. 9, at page 88, and is, in words and figures, as follows, to-wit:

102 *Judgment.*

STATE OF SOUTH DAKOTA,
County of Lincoln, ss:

In Circuit Court, Second Judicial Circuit.

C. B. KENNEDY, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendant.

On this 28th day of May, A. D. 1909, the above entitled action came regularly on to be heard by the Circuit Court, of the Second Judicial Circuit, of the State of South Dakota, at chambers thereof, in the court house, in the city of Sioux Falls, in said Circuit, upon motion of the plaintiff for judgment on the verdict of the jury duly returned herein on the 12th day of February, A. D. 1909, being then and there the regular February, A. D. 1909, term of said Court, in favor of the plaintiff upon all of the issues raised by the pleadings herein, and assessing his damages at the sum of one hundred dollars, and for double the damages so found, pursuant to the statute in such case made and provided; the plaintiff duly appearing in propria persona, and by Arthur R. Brown, Esq., his attorney; the defendant duly appearing by W. G. Porter, Esq., its attorney.

The Court, after hearing C. B. Kennedy and Arthur R. Brown, in favor of said motion, and W. G. Porter opposed, took the matter under advisement.

And now on this, the 20th day of July, A. D. 1909, upon
103 due consideration and advisement, it duly appearing to the Court, that the verdict of the jury aforesaid, was duly returned in this action as aforesaid, and duly entered in the minutes of this Court and recorded.

And it further duly appearing to this Court, that the plaintiff herein is entitled to a judgment for double the damages found by the verdict of the jury aforesaid, to-wit: For the sum of two hundred dollars, as provided by Chapter 215 of the Session Laws of the state of South Dakota for the year A. D. 1907.

It is therefore Ordered that the motion of the plaintiff for judgment herein as aforesaid, be, and the same is, hereby sustained.

And it is further Adjudged that C. B. Kennedy, the plaintiff herein, do have and recover of, and from the said defendant, The Chicago, Milwaukee & St. Paul Railway Company, the sum of two hundred dollars, being the amount of his damages assessed and found by the verdict of the jury aforesaid, together with double damages provided by the statute aforesaid, besides the costs of this action to be hereinafter taxed by the Clerk of this Court, and inserted in this Judgment at — dollars; making in all the sum of two hundred and — dollars.

104 Done at Sioux Falls, in said Circuit, this 20th day of July, A. D. 1909.

By the Court:

JOSEPH W. JONES, *Judge.*

Attest:

[SEAL.] GEO. OLSON, *Clerk.*

To the making of the foregoing Judgment the defendant, by its counsel, excepted which exception is duly allowed.

JOSEPH W. JONES, *Judge.*

Specifications of Error.

The defendant and appellant says and avers that the trial Court erred, and there is manifest error on the face of the record in this:

I.

That the Court erred, in overruling defendant's objection to the introduction in the evidence of plaintiff's Exhibit "B" G. H. M., the same being the alleged notice and affidavit of loss served upon defendant's station agent at Canton, Lincoln county, South Dakota, on the 15th day of October, A. D. 1908.

II.

That the Court erred, and committed manifest error, in granting and sustaining plaintiff's motion for judgment on the verdict for double the amount thereof, the same being allowed as double dam-
ages under the provisions of Chapter 215 of the Session Laws
105 of the state of South Dakota for the year, 1907. The defendant excepted to the granting and allowance of said motion and the double damages prayed for, upon the grounds: That Chapter 215 of the Session Laws of the state of South Dakota for the year 1907, under which plaintiff seeks to recover double damages and double the amount of the verdict, is unconstitutional, null and void. That the said law referred to in paragraphs nine and ten of plaintiff's complaint, and the provisions thereof, and the whole of said law, to-wit: Chapter 215 of the Session Laws of 1907 of the state of South Dakota, on the face of said law, is unconstitutional, null, and void in this:

(*a*) That said law and the provisions thereof are in violation of and repugnant to Sections 2 and 18, of Article 6, of the Constitution of the state of South Dakota.

(*b*) That plaintiff seeks, by means of said law, to deprive defendant of its property without due process of law.

(*c*) That said law denies to defendant the equal protection of the laws.

(*d*) That said law is repugnant to the fourteenth amendment to the Constitution of the United States, and that plaintiff seeks

hereunder to deprive defendant of its property without due process of law.

106 (*e*) That said law and the provisions thereof are repugnant to the fourteenth amendment to the Constitution of the United States, in that thereunder defendant is denied the equal protection of the law.

(*f*) That the enforcement of said law will amount to the taking of defendant's property without compensation and is in violation of the protection guaranteed to the defendant by the fourteenth amendment to the Constitution of the United States.

(*g*) That said Chapter 215, is repugnant to and violates the provisions of Section 21, of Article 3, of the Constitution of the state of South Dakota, which provides that no law shall imbrace more than one subject, which shall be expressed in its title, and is therefore null and void.

III.

That the Court erred and committed manifest error, in rendering judgment in favor of the plaintiff and against the defendant for twice the amount of the verdict; the same being allowed as double damages under the provisions of Chapter 215 of the Session Laws of the state of South Dakota for 1907. Defendant says the rendition and granting of said judgment was error, as the said Chapter 215 and the provisions thereof, are unconstitutional, null, and void, and repugnant to Sections 2 and 18 of Article 6, and Section

107 21 of Article 3, of the Constitution of the state of South Dakota; and that the same are repugnant to the fourteenth amendment to the Constitution of the United States.

Wherefore, And because of the aforesaid errors, the defendant and appellant prays that the judgment herein be reversed.

WILLIAM G. PORTER.
Attorney for Defendant.
CHARLES E. VROMAN,
Of Counsel.

Stipulation for Settlement of Bill of Exceptions.

(Title Omitted.)

It is hereby Stipulated and Agreed, by and between the parties to the above entitled action, by their respective counsel, that the annexed proposed Bill of Exceptions is in all respects true and correct, and contains all the necessary evidence and proceedings for the reviewal of the judgment rendered in said cause, and any and all intermediate orders of the Court relating thereto; and that said proposed Bill of Exceptions may be signed, settled, and certified by the Judge of the above named Court, as a full, fair, true, and correct Bill of Exceptions in this cause, without further notice to us or

either of us, all notice of the settlement of said Bill of Exceptions being hereby expressly waived.

108 Dated at Sioux Falls, South Dakota, this 8th day of September, A. D. 1909.

A. R. BROWN AND
C. B. KENNEDY,
Attorneys for Plaintiff.
WILLIAM G. PORTER,
Attorney for Defendant.

Certificate Settling Bill of Exceptions.

(Title Omitted.)

Now, inasmuch as the foregoing matters and things do not now appear of record in this action, and counsel for defendant being desirous of preserving them and making them matters of record by way of Bill of Exceptions, the Court being satisfied that the notice of the settlement of the foregoing Bill of Exceptions has been duly waived by the respective attorneys for plaintiff and defendant, and that the respective parties in the above entitled action, by their counsel, have duly stipulated that the foregoing Bill of Exceptions may be used and shall constitute the true, and fair Bill of Exceptions in the above entitled action, and that the same may be signed and certified by the said Judge, and settled by him as a true, fair, and complete Bill of Exceptions in the above entitled action; and the said defendant having now presented its proposed Bill of Exceptions for settlement, as provided by law, and in conformity to and in

109 accordance with the stipulation herein made, it is hereby certified that the foregoing contains all the evidence introduced upon the trial of this action, or offered, or given by either and both parties at the trial, necessary for the consideration of the errors assigned by defendant, and upon which defendant relies, with all the rulings of the Court, and exceptions of counsel thereto, and all other matters and proceedings necessary for the proper review of the alleged errors herein; and this is hereby certified by me and the order of the Court is, that the same is a true, full, correct, and fair Bill of Exceptions in this cause, and the said Bill of Exceptions proposed by defendant is hereby allowed, settled, and certified accordingly, and it is ordered that the same be filed as part of the judgment roll in this cause.

Done in open Court at the city of Sioux Falls, South Dakota, this 9th day of September, A. D. 1909.

By the Court:

JOSEPH W. JONES, *Judge.*

Order Extending Time in Which to Settle Bill of Exceptions.

(Title Omitted.)

The above entitled action coming regularly on for hearing upon the application of the defendant for an order allowing said defendant ninety days in which to perfect an appeal of said cause,
110 and in the meantime staying all proceedings except the entry of judgment and taxation of costs; and it appearing to the satisfaction of the Court that said defendant intends to appeal from the judgment herein, and that said stay of proceedings is for the purpose of allowing defendant to perfect its said appeal, and the Court being fully advised in the premises, it is, upon motion of William G. Porter and Charles E. Vroman, attorneys for defendant,

Ordered, That the defendant have, and is hereby granted until September 10, 1909, in which to make, serve, file, and settle a Bill of Exceptions and Assignment of Errors, and to perfect an appeal in said cause.

It is further Ordered that all proceedings in said action, except the entry of judgment and taxation of costs, be, and the same are hereby stayed for the said period of ninety days.

Done in open Court, at the city of Sioux Falls, South Dakota, this 20th day of July, A. D. 1909.

By the Court:

JOSEPH W. JONES, *Judge.*

Attest:

[SEAL.] GEO. OLSON, *Clerk.*

That thereafter, and on the 14th day of September, 1909, at Canton, South Dakota, the defendant and appellant, duly perfected its appeal to the Supreme Court of the state of South Dakota by personally serving upon C. B. Kennedy and Arthur R.
111 Brown, the attorneys for plaintiff and respondent, and personally serving upon George Olson, Clerk of said Circuit Court, its notice of appeal herein, and its undertaking on appeal herein, in the manner and form required by law for the payment of costs upon such appeal, and for the payment of the judgment appealed from in case such judgment should be affirmed, or the said appeal be dismissed, and on the 14th day of September, 1909, duly filed the same together with the proof of service thereof endorsed thereon, with the Clerk of the said Circuit Court at his office in the city of Canton, in said Lincoln county, state of South Dakota, which said notice of appeal is as follows, to-wit:

Notice of Appeal.

(Title Omitted.)

To Arthur R. Brown and C. B. Kennedy, Attorneys for the Above Named Plaintiff and Respondent, and to George Olson, Clerk of Said Circuit Court:

You will Please Take Notice, That the Chicago, Milwaukee & St. Paul Railway Company, a Corporation, defendant and appellant in the above entitled action, appeals from a judgment rendered on the 20th day of July, 1909, and entered on the 23rd day of July, 1909, therein, in favor of the plaintiff and against the defendant for two hundred eighty-one dollars and eighty-five cents ($281.85)
112 and from the whole thereof to the Supreme Court of the state of South Dakota. And you are further notified that said appellant upon said appeal will insist upon review and reversal, by said Supreme Court, of the following intermediate order, made and entered by said Circuit Court in said cause, to-wit: The order made by said Circuit Court, and entered herein on the 23rd day of July, 1909, sustaining and granting plaintiff's motion for judgment on the verdict for twice the amount of said verdict, besides costs, under the provisions of Chapter 215 of the Session Laws of the state of South Dakota for the year A. D. 1907.

Yours, Etc.,

WILLIAM G. PORTER,
Attorney for Defendant and Appellant.
CHARLES E. VROMAN,
Of Counsel.

And which said undertaking on appeal is as follows, with acknowledgments and justification of sureties and title omitted:

Undertaking on Appeal to the Supreme Court.

Whereas, On the 20th day of July, 1909, in the Circuit Court within and for the county of Lincoln, state of South Dakota, a judgment was rendered in favor of the said plaintiff and against the said defendant, which said judgment was filed, entered, and
113 docketed in the office of the Clerk of said Court on the 23rd day of July, 1909, and

Whereas, The above named defendant and appellant, feeling and deeming itself aggrieved thereby, intends to appeal therefrom to the Supreme Court of the state of South Dakota.

Now Therefore, We do hereby undertake that the said appellant will pay all the costs and damages which may be awarded against it on the said appeal, or on the dismissal thereof, not exceeding two hundred fifty dollars; and do also further undertake that if the said judgment so appealed from, be affirmed, or the said appeal be dismissed, the said appellant will pay the amount directed to be paid

by the said judgment, or the part of said amount as to which the said judgment shall be affirmed if it be affirmed only in part, and all damages and costs which shall be awarded against the said appellant upon the said appeal.

Dated at Sioux Falls, S. D., this 11th day of September, A. D. 1909.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By WILLIAM G. PORTER,
Its Duly Authorized Agent and Attorney.
ROGER L. DENNIS.
H. R. DENNIS.

Assignment of Errors.

The Assignment of Errors corresponds with the Specification of Errors, which errors are numbered from one to three inclusive, and are fully set forth in Abstract: Abs. pp. 22-25, ff. 65-73. And the same are relied upon and urged upon this appeal.

114

Respectfully submitted,

WILLIAM G. PORTER,
Attorney for Defendant and Appellant.
CHARLES E. VROMAN,
Of Counsel.

Clerk's Certificate.

(Title Omitted.)

I, George Olson, Clerk of the Circuit Court within and for said county and state, do hereby certify that the within and annexed papers, to-wit: Summons, complaint, answer, plaintiff's notice of trial, defendant's note of issue and notice of trial, amended answer, verdict, motion for judgment on the verdict for twice the amount thereof, judgment, notice of taxation of costs, exceptions to items of cost, notice of appeal from taxation of costs, bill of exceptions, stipulation for settlement of bill of exceptions, certificate of judge settling bill of exceptions, notice of appeal, and undertaking on appeal, are the original papers in the above entitled action, and constitute the judgment roll as required by law, and they are hereby transmitted by me to the Supreme Court of the state of South Dakota, pursuant to the appeal taken therein.

115 [Endorsed:] In the Supreme Court of the State of South Dakota, April Term, A. D. 1910. C. B. Kennedy, Plaintiff and Respondent, vs. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Defendant and Appellant. Appeal from Circuit Court of Lincoln County, South Dakota. Hon. Joseph W. Jones, Presiding Judge. Abstract. William G. Porter, Attorney for Defendant and Appellant. Charles E. Vroman, Of Counsel.

116 And afterwards, to wit; on the fifteenth day of February, A. D. One Thousand Nine Hundred Ten, the cause was placed on the calendar of the Supreme Court; and afterwards, to wit; on the twenty-eighth day of April, A. D. One Thousand Nine Hundred Ten, this cause was called and argued by counsel, and submitted; and afterwards, to wit; on the third day of October, A. D. One Thousand Nine Hundred Eleven, the judgment of the lower court was affirmed, which opinion is in words and figures as follows, to wit:

117 In the Supreme Court, State of South Dakota.

C. B. KENNEDY, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendant and Appellant.

Appeal from Circuit Court of Lincoln County.

Hon. Joseph W. Jones, Judge.

Opinion. Filed Oct. 3, 1911.

118 William G. Porter, J. D. Elliott, for Appellant.
C. B. Kennedy, A. R. Brown, for Respondent.

CORSON, *J.:*

This is an appeal by the defendant from a judgment entered in favor of the plaintiff. The action was instituted apparently under the provisions of Chapter 215 of the Laws of 1907. The complaint, after alleging the incorporation of the defendant, that it was engaged in the business of transporting passengers and freight within this state, that the plaintiff was the owner of a certain quarter section of land in Lincoln County over which the railroad was constructed, and that certain hay and grass thereon owned by the plaintiff was destroyed by fire caused by defendant's locomotive, in its seventh paragraph, alleges: "That the defendant was negligent in that its engine which caused the said fire was not properly constructed so — to prevent the escape of sparks and was out of repair, and the screens for the prevention of the escape of fire and sparks were out of repair to such a degree that sparks escaped therefrom and flew over the right-of-way of the plaintiff and set fire to the meadow and growing clover crop and stacked hay of the plaintiff. That on the defendant's right-of-way was large quantities of dry, dead grass, and other combustible rubbish allowed by the defendant to accumulate; that the engine of the defendant so carelessly constructed and out of repair, set fire to said dead grass and rubbish on the defendant's right-of-way and the defendant carelessly and negligently allowed it to escape therefrom and to spread on to the meadow of the plaintiff and to burn the same together with his hay and second crop of clover. That the defendant was generally negli-

gent in the operation of its said engine touching the escape of fire but this plaintiff cannot specify all the particulars thereof,
119 but they are known to the defendant as the plaintiff is informed and believes."

Plaintiff further alleges, in substance, that he was damaged by reason of the setting fire to his meadow and burning of a stack of hay, and that he served notice in writing upon the defendant as provided in Chapter 215 of the Session Laws of 1907, and that the defendant has refused to pay the amount claimed, and demands judgment for the amount of his damage.

The defendant, in its answer, denies generally and specifically, all of the allegations of the complaint,—except the fact of its incorporation and operation of its road over the quarter section of land described in plaintiff's complaint,—and for an affirmative defense alleges: That Chapter 215 of the Session Laws of this state for the year 1907, under which the plaintiff seeks to recover double damages, is unconstitutional and void. The trial was had before the court and a jury and the jury returned a verdict in favor of the plaintiff for the sum of $100.00, and judgment was thereupon rendered by the court for double the amount so found by the jury in favor of the plaintiff.

It is stated by the appellant in its brief that it relies for a reversal of the said judgment upon two grounds: 1. That Chapter 215 embraces two subjects, viz., 1. declaring an absolute liability in all cases for damages from fire communicated by locomotive engines, that did not exist at common law; and 2. that it provides for double damages in case such corporation fails or neglects to pay the damages within sixty days after notice, etc.; and that the act therefore violates section 21 of Article 3 of the constitution of the State
120 of South Dakota, which provides as follows: "No law shall embrace more than one subject, which shall be expressed in its title." 2. That the act, so far as it provides for double damages, denies to the appellant the equal protection of the laws and is, therefore, repugnant to the fourteenth amendment of the Constitution of the United States, and also that said act is repugnant to Sections 2 and 18 of Article six of the Constitution of the State of South Dakota.

The title of the act is as follows: "An Act requiring Railroad Corporations to Pay Double the Amount of Damages Incurred from Loss of Property, Injured or Destroyed by Fires Communicated by Locomotive Engines, or from the Burning of Grass, Weeds or Rubbish on Right of Way by Employees of such Corporations, in Certain Cases."

The material provisions of the act are as follows: "Each railroad corporation owning or operating a railroad in this state, shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, or by the burning of grass, weeds or rubbish on right of way by employees of such corporation. * * * Whenever the property owned by any person or corporation shall be injured or destroyed by fire communicated by locomo-

tives in use upon any railroad owned or operated by a railroad corporation, or by the burning of grass, weeds and rubbish on the right of way by employees of such corporation, so as to render the railroad corporation liable, under section 1 of this act, or otherwise the owner of such property injured or destroyed may recover damages for such loss, and to recover the same it shall only be necessary for him to prove the loss of or injury to his property. If such
121 corporation fails or neglects to pay such damage within sixty days after notice in writing that a loss or injury has occurred, * * * such owner shall be entitled to recover from the corporation double the amount of damages actually sustained by him in any court of competent jurisdiction. * * *."

It will be observed that in the title of the act the only subject referred to is "double the amount of damages incurred from loss of property", and that there is nothing in the title referring to that part of the act which relieves the party damaged from his common law duty to allege and prove negligence on the part of the defendant in causing the damage. It will, however, be observed by the provisions of the first section, and the clause in the second section providing, "the owner of such property injured or destroyed may recover damages for such loss, and to recover the same it shall only be necessary for him to prove the loss or injury to his property." Reading, therefore, the first section in connection with the clause last quoted from the second section, it will be observed that the act clearly assumes to relieve a party from his common law duty of alleging and proving negligence on the part of the defendant in order to entitle him to recover damages in an action instituted to recover the same under the act.

As will be observed by the reading of the title of the act, no reference is made or intimation given that the act contains any provision relieving the plaintiff from his common law liability or making the defendant railway corporation liable without proving that it has been guilty of negligence in operating its road or in the use of defective or unsuitable locomotives. The title of the act, therefore, is not broad enough to include the provisions relieving a party from the duty of proving negligence on the part of the railway company in order to entitle him to recover damages claimed to have
122 been suffered by him, caused by fire as provided in the act, and hence so much of the act as purports to relieve the party damaged, from proving negligence on the part of the defendant to entitle him to recover, must be held unconstitutional and void.

The provisions contained in Section 21 of Article 3 of our Constitution have been incorporated into the Constitutions of most of the states, and the necessity of such a provision is so fully and clearly stated in the opinion of this court in State v. Morgan, 2 S. D. 32, and in State v. Becker, 3 S. D. 29, that a further discussion of the propriety of such a provision need not be further considered.

It does not follow, however, that the act, so far as relates to double damages, should be held unconstitutional and void. This court held in the case of State v. Morgan, supra, that "A portion of a statute may be unconstitutional and stricken out, and if that which remains is complete in itself, and capable of being executed in ac-

cordance with the apparent legislative intent, wholly independent of that which is rejected, the statute must be sustained."

And in State v. Becker, supra, this court again discussing this constitutional provision, in its opinion says: "The rule is that if, when the unconstitutional portion is stricken out, that which remains is complete, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. Cooley, Const. Lim. §178, and numerous cases cited; Suth. St. Const. §103, and numerous cases cited. And it is not necessary, in order to make such rejection allowable, that the obnoxious matters be contained in independent provisions. The distribution of the law into distinct divisions
123 or sections is purely arbitrary. The test is whether they are essentially and inseparably connected in substance. People v. Kenney, 96 N. Y. 294; Com. v. Hitchings, 5 Gray, 482; Tiernan v. Rinker, 102 U. S. 123; Mewherter v. Price, 11 Ind. 199."

See also In re Construction of Revenue Law, 2 S. D. 58, 48 N. W. 813; In re Assessment and Col. of Taxes, 4 S. D. 6, 54 N. W. 818; Woods et al. v. Carl, 75 Ark. 328, 5 Ann. Cases 423; Fite v. State ex rel. Nick Snider, 114 Tenn. 646, 4 Ann. Cases 1108.

And a further qualification may be added. A statute unconstitutional in part cannot be upheld as to the remainder, unless the latter is in itself a complete law, capable of enforcement, and such as the legislature, it may be presumed, would have passed without the rejected portions. McDermont v. Dinnie, 6 N. D. 278, 69 N. W. 294.

It clearly appears from a careful examination of the act we are considering that the provisions of the act for doubling the amount of damages recovered remain complete in themselves and capable of being executed in accordance with the apparent legislative intent, wholly independent of the provisions held unconstitutional. The intent of the legislature to provide for doubling the damages, "whenever the property owned by any person or corporation shall be injured or destroyed by fire communicated by a railroad corporation, or by the burning of grass, weeds and rubbish on the right of way by employees of such corporation," and such corporation fails or neglects to pay such damage within sixty days after notice in writing that a loss or injury has occurred, "such owner shall be entitled to recover from the corporation double the amount of damages actually sustained by him in any court of competent jurisdic-
124 tion," is clearly apparent from the title of the act. The act, therefore, with the unconstitutional provisions eliminated, must be held constitutional, following the decisions of Jensen v. South Dakota Cent. Ry. Co., 25 S. D. 506, 127 N. W. 650, and Polt v. C. M. & St. P. Ry. Co., — S. D. —, 128 N. W. 472, recently decided by this court in which it was held, the law imposing double damages as provided in the act in question, is constitutional and valid. As those cases were fully considered and discussed by this court, we do not deem it necessary to enter upon a further discussion of that question.

In the case of Bekker v. White River Valley Ry. Co., — S. D. —, N. W. —, recently decided by this court it was held that the pro-

vision of Chapter 218 of the Laws of 1907, in so far as it requires railroad companies to pay double damages incurred from loss of live stock killed or injured, is constitutional, but that so much of the statute as relieves the party plaintiff from proving negligence in the killing of the stock by the railway company, is unconstitutional. The court therefore reversed the judgment in that case for the reason that the trial court in its charge to the jury improperly instructed them as to the facts necessary for the plaintiff to prove to entitle him to recover.

In the case at bar, however, as the plaintiff alleged that the damages were caused by the negligence of the defendant, which is denied by the answer, an issue was raised properly to be tried by the jury, and as the evidence and charge of the court are omitted from the abstract, we must presume, in support of the judgment, that the proper facts were proven entitling the plaintiff to recover, and that the jury was properly instructed as to the law of the case, and therefore the judgment in this case must be affirmed.

125 In 2 Ency. Pl. & Pr. 428, the law applicable to the case at bar is thus stated: "The general presumption will be made in favor of a decision appealed from, where the record does not affirmatively show error, that every proceeding below essential to its legality was validly taken, and that every fact essential to its regularity was legally shown. And where, on any contingency supposable in the state of the record, the decision below might have been valid, such contingency will be so presumed." And the learned author cites a long array of authorities from nearly all of the states of the union in support of the text.

The learned author in a note, p. 430, restates the rule as follows: "Where an appeal to this court is to be determined on the judgment-roll alone, all intendments will be in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken. If the error relied on to destroy such presumptions consists in matters dehors the record, such matters must be brought to this court by a bill of exceptions or other appropriate method. If any matters could have been presented to the court below which would have authorized the entry of this judgment, it will be presumed that such matters were presented and that the judgment was entered in accordance therewith."—Citing Caruthers v. Hensley, 90 Cal. 559.

The law as above stated has been approved by this court, and by the former territorial court. Searls v. Knap, 5 S. D. 325, 58 N. W. 807; Gross v. Evans, 1 Dak. 387, 46 N. W. 1132; Myers v. Mitchell, 1 S. D. 249, 46 N. W. 245; Merrill v. Luce, 6 S. D. 354, 61 N. W. 43.

See also Parkinson v. Thompson, 164 Ind. 609, 3 Ann. Cases, 677, and cases cited. The judgment of the Circuit Court is affirmed.

126 File No. 2853.

In the Supreme Court, State of South Dakota, October Term, A. D. 1911.

Present: Ellison G. Smith, Presiding Judge; Dighton Corson, Dick Haney, Chas. S. Whiting and J. H. McCoy, Judges of Said Court, and the officers thereof.

C. B. KENNEDY, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendant and Appellant.

This action coming on to be heard at the April A. D. 1910 Term of this Court at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case and without oral argument; and the Court having advised thereon and filed its decision in writing,

It is considered, ordered and adjudged, That the judgment of the Circuit Court, within and for Lincoln County, appealed from herein, be and the same is hereby affirmed.

And it is further ordered, That this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And it is further ordered and adjudged, That respondent have and recover of the appellant costs and disbursements on this appeal, expended, taxed and allowed at —.

By the Court,

[SEAL.] ELLISON G. SMITH,
Presiding Judge.

Attest:

FRANK CRANE, *Clerk.*
By —— ——, *Deputy Clerk.*

127 [Endorsed:] (File No. 2853.) In Supreme Court, State of South Dakota, October Term, 1911. C. B. Kennedy, Plaintiff and Respondent, vs. C. M. & St. P. Ry. Co., Defendant and Appellant. Supreme Court, State of South Dakota. Filed Oct. 3, 1911. Frank Crane, Clerk. Remittitur sent down —. Recorded in Judgment Book —. Page —.

128 And afterwards, to wit; on the third day of November, A. D. One Thousand Nine Hundred Eleven, a petition for rehearing was filed, which in words and figures is as follows, to wit:

129 In the Supreme Court of the State of South Dakota, October Term, 1911.

No. 2853.

C. B. KENNEDY, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation, Defendant and Appellant.

Petition for Rehearing.

Comes now the above named appellant, Chicago, Milwaukee and St. Paul Railway Company, by its attorney, William G. Porter, and within the time provided by the rules of this Court, makes, serves and files this, its petition for rehearing, and as grounds and reasons fur such rehearing respecfully shows:

I.

The Court made a mistake regarding the contents of the record and the position of counsel, and failed to consider controlling facts and points in the following particulars, to-wit:

1. In failing to consider assignment of error (*d*) abstract p. 23, brief p. 5, f. 13, which is as follows, "That the said law is repugnant to the Fourteenth Amendment to the Constitution of the United States and the plaintiff seeks thereunder to deprive defendant of its property without due process of law."

2. In failing to consider an important and controlling fact and point and the position of the counsel respecting the same, namely: assignment (*e*)—"That said law, and the provisions thereof are repugnant to the Fourteenth Amendment to the Constitution of the United States and that thereunder defendant is denied the equal protection of the laws," abstract p. 24, f. 70, brief p. 5, f. 14.

130 3. In failing to consider a controlling point and the position of counsel in respect thereof, specified as assignment (*f*), abstract p. 24, f. 70, brief p. 5, f. 14, which is stated as follows: "That the enforcement thereof will amount to the taking of defendant's property without just compensation and is in violation of the protection guaranteed to the defendant by the Fourteenth Amendment to the Constitution of the United States."

II.

That the Court failed to consider the fact that Chapter 215 of the Session Laws of South Dakota for 1907 does not limit its provisions to fires set out by locomotive engines in use upon a railroad owned and operated by a corporation, but also applies to fires set out by employees of a railroad corporation "by burning of grass, weeds or rubbish on the right of way," and does not apply to other persons or their employees in the setting out of fires, and therefore is

an unjust and unfair discrimination against railway corporations, singling them out and making them a class by themselves without any authority of law and in violation of law and the Constitution of the United States.

III.

That the Court made other and further mistakes regarding the contents of the record and the position of counsel, as shown by the following excerpt from certified copy of the opinion: "The act, therefore, with the unconstitutional provisions eliminated, must be held constitutional, following the decisions of Jensen v. South Dakota Central Ry. Co. 25 S. D. 506, 127 N. W. 650, and Polt v. C. M. & St. P. Ry. Co., 128 N. W. 472, recently decided by this court in which it was held, the law imposing double damages as provided by the act in question, is constitutional and valid. As these cases were very fully considered and discussed by this Court we do not deem it necessary to enter upon a further discussion of that question." For the reason that numerous and important and controlling authorities were cited in support of the proposition that the
131 double damage law known as Chapter 215 of the Session Laws of 1907 of South Dakota is null and void and unconstitutional and in violation of the provisions of the Fourteenth Amendment *fo* the Constitution of the United States. And for the further reason that the Court failed to consider, as we think should have been done under our brief in said case, the authority of Atchison etc. Ry. Co. vs. Mathews, 174 U. S. 96, and the authority of Ry. Co. vs. Ellis, 165 U. S. 150, and other authorities cited in brief on same point.

IV.

That the Court made a mistake and failed to properly consider, we think, controlling authorities cited by appellant upon the unconstitutionality of the double damage statute aforesaid, and wholly failing to discuss in any manner the federal question and right or immunity fully and completely urged in the assignment of errors of appellant, and in its brief, and in failing to consider, as seems to us, the new and further authorities and points, submitted by us in regard to the unconstitutionality of the said double damage fire statute of South Dakota and the particular respects in which it violated the Constitution of the United States and particularly the Fourteenth Amendment to the Constitution of the United Sates.

V.

The Court made a mistake and, as appears to us, did not fully consider the special points raised in this appeal when it said "In the case at bar, however, as the plaintiff alleged that the damages were caused by the negligence of the defendant, which is denied by the answer, an issue was raised properly to be tried by the jury, and as the evidence and charge of the Court are omitted from the abstract, we must presume in support of the judgment, that the proper facts were proven entitling the plaintiff to recover and that the

jury was properly instructed as to the law of the case, and therefore the judgment in this case must be affirmed." For the reason that it was distinctly pointed out in the abstract and in the brief,
132 and in fact continuously claimed at all steps in said case, that this appeal was taken solely upon and sought to raise the sole question of the constitutionality of the said Chapter 215 of the Session Laws of the State of South Dakota for 1907, and sought a reversal of the said case solely upon the point of the unconstitutionality of said act. The evidence and charge of the Court were purposely omitted for the reason that the verdict was not excessive, in the event plaintiff was entitled to recover at all. Mention is made of this matter, because this case was appealed particularly from errors of the lower court in rendering judgment in said case and in doubling the amount of the verdict and holding the said law constitutional, appellant seeking at all times especially to call the Court's attention to the unconstitutionality of said act and insisting on the fact that a federal question and right was involved and that appellant was deprived of its right in the enforcement of said law. And we think the Court made a mistake in wholly overlooking the assignment of errors on those points set out at length in the abstract, p.p. 17-18-19, f.f. 50-57, brief p.p. 4-5-6, f.f. 12-15.

VI.

The Court made a mistake in failing to consider that this appeal was taken alone from the judgment and the order allowing the Court to double the amount of the verdict and actual damages sustained and the sole question involved was the error of the court in allowing the motion for judgment upon the verdict as prayed for by respondent and error of court holding said Chapter 215 of the Session Laws of South Dakota for 1907 constitutional and enforcible.

Wherefore the defendant and appellant respectfully prays for a rehearing and reargument therein and for such other and further relief as may to the Court seem proper.

Respectfully submitted,

WILLIAM G. PORTER,
Attorney for Defendant and Appellant.

Dated at Aberdeen, S. D., October 30th, 1911.

133 [Endorsed:] 2853. In the Supreme Court of the State of South Dakota, October Term, 1911. C. B. Kennedy, Plaintiff & Respondent vs. C. M. & St. P. Ry. Co., Defendant & Appellant. Petition for Rehearing. Supreme Court, State of South Dakota. Filed Nov. 3, 1911. Frank Crane, Clerk.

134 STATE OF SOUTH DAKOTA,
Supreme Court:

I, Frank Crane, Clerk of the Supreme Court of the State of South Dakota, do certify that cause No. 2853, Kennedy vs. Chicago, Milwaukee & St. Paul Railway Company, was on the twenty-ninth day

of February, A. D. 1912, called in open court on petition for rehearing and said petition was denied in open court; that the same is now of record in this court; that no written order denying the petition was handed down; and that a record of said proceeding is found on page 74 of Journal No. 6, of the Supreme Court of South Dakota.

Dated this first day of April, A. D. 1912.

[Seal Supreme Court, State of South Dakota.]

FRANK CRANE,
Clerk of the Supreme Court,
State of South Dakota.

135 [Endorsed:] 2853. Supreme Court, State of South Dakota. Filed Apr. 1, 1912. Frank Crane, Clerk.

136 And Afterwards, to-wit: on the Twenty-ninth day of February, A. D. One Thousand Nine Hundred Twelve, the petition for rehearing was denied; and afterwards, to wit; on the fifteenth day of March, A. D. One Thousand Nine Hundred Twelve, a petition for writ of error to the Supreme Court of the United States was filed, which in words and figures is as follows, to wit:

137 In the Supreme Court of the State of South Dakota, October Term, 1911.

C. B. KENNEDY, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
a Corporation, Defendant and Appellant.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota.

Now comes the above named defendant and appellant, by William G. Porter, its attorney, and complains and alleges:

That on the 3rd day of October, 1911, the Supreme Court of the State of South Dakota, made and entered a final judgment herein in favor of said respondent and against the said appellant, and on the 29th day of February, 1912, denied an application for rehearing in said case in which said final judgment, and said final judgment on rehearing, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the said defendant and appellant all of which will more in detail appear from the assignment of errors which is filed in connection with this petition. That the said Supreme Court of the State of South Dakota is the highest court of the said State in which a decision in this action and in this matter could be had. That the appellant is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin and doing business in, and having duly complied with the laws of, the State of South Dakota.

That this action was brought by the said plaintiff and respondent as appears by his complaint and the record therein in the Circuit Court of Lincoln County, and in the State of South Dakota, to recover double damages in the sum of $1,600.00 under the provisions of Chapter 215 of the Session laws of South Dakota for the year 1907, requiring railroad corporations to pay double the amount of damages incurred by fires communicated by locomotive
138 engines. It was alleged in substance in plaintiff's complaint that he had sustained actual damages in the sum of $800.00 on account of loss of certain property, occasioned by a fire communicated and set by a locomotive engine in use on appe[illegible]nt's railroad, to the grass on land adjoining said line of railway of appellant, near the premises occupied by respondent. That the said fire spread and communicated to the premises occupied by plaintiff, consuming and destroying the said property of the value aforesaid.

II.

The petitioner herein duly answered said complaint admitting the incorporation of defendant and denying the other allegations thereof; for an affirmative and further defense, alleged: corporate existence of defendant, the purchase of right of way for valuable consideration over and across plaintiff's lands for railroad purposes; that the damage complained of was contemplated, considered, determined and fully compensated: That Chapter 215 of the Session Laws of the state of South Dakota for the year 1907, under which plaintiff seeks to recover double damages and damages double in the amount of those actually sustained, is unconstitutional, null, and void. That the said law referred to in paragraphs nine and ten of plaintiff's complaint, and the provisions thereof, and the whole of said law, to-wit: Chapter 215 of the Session Laws of 1907 of the state of South Dakota are, on the fact of the said law, unconstitutional, null and void, in this:

1. That plaintiff seeks to deprive defendant of its property without due process of law.

2. That said law denies to defendant the equal protection of the laws.

3. That said law is repugnant to the fourteenth amendment to the constitution of the United States, and that plaintiff seeks thereunder to deprive defendant of its property without due process of law.

4. That said law and the provisions thereof are repugnant
139 to the fourteenth amendment of the Constitution of the United States, and that thereunder defendant is denied the equal protection of the laws.

5. That the enforcement thereof will amount to the taking of defendant's property without just compensation and is in violation of the protection guaranteed to the defendant by the fourteenth amendment to the Constitution of the United States.

That the plaintiff, if he recovers anything at all as actual damages, is not entitled to recover double the amount of such damages, the

said law, under which said double damages is sought to be recovered, being unconstitutional, null, and void:

That it singles — out of all citizens and Corporations, and requires them to pay, in certain cases, double damages to the party successfully suing them, while it gives them no corresponding benefit; that such law of 1907 attempts to punish the defendant for no wrong or act of negligence upon its part. Judgment demanded for a dismissal of the complaint upon the merits, besides costs and disbursements.

III.

Subsequently, the issues raised by the said pleadings came on for trial in said court on the 10th day of February, 1909, and was tried to a jury, resulting in a verdict in favor of the plaintiff and against the defendant, the petitioner herein, in the sum of $100.00; that thereafter, pursuant to notice, upon motion of the plaintiff, the court on the 20th day of July, 1909, did render judgment thereon in favor of the plaintiff and against defendant, the petitioner herein, in double the amount of said verdict, to-wit, in the sum of $200.00, including the interest on the sum $200.00 from the date of the verdict, and $81.85 costs.

IV.

That thereafter in due time a bill of exceptions was duly prepared and allowed by the Judge of said court as provided
140 by laws, including specification of errors, specifying, among other things:

1.

That the Court erred, and committed manifest error, in granting and sustaining plaintiff's motion for judgment on the verdict for double the amount thereof, the same being allowed as double damages under the provisions of Chapter 215 of the Session Laws of the State of South Dakota for the year, 1907. The defendant excepted to the granting and allowance of said motion and the double damages prayed for, upon the grounds: That Chapter 215 of the Session Laws of the state of South Dakota for the year 1907, under which plaintiff seeks to recover double damages and double the amount of the verdict, is unconstitutional, null and void. That the said law referred to in paragraphs nine and ten of plaintiff's complaint, and the provisions thereof, and the whole of said law, to-wit: Chapter 215 of the Session Laws of 1907 of the state of South Dakota, on the face of said law, is unconstitutional, null, and void in this:

(*a*) That said law and the provisions thereof are in violation of and repugnant to Sections 2 and 18, of Article 6, of the Constitution of the state of South Dakota.

(*b*) That plaintiff seeks, by means of said law, to deprive defendant of its property without due process of law.

(*c*) That said law denies to defendant the equal protection of the laws.

(*d*) That said law is repugnant to the fourteenth amendment to the Constitution of the United States, and that plaintiff seeks thereunder to deprive defendant of its property without due process of law.

(*e*) That said law and the provisions thereof are repugnant to the fourteenth amendment to the Constitution of the United States, in that thereunder defendant is denied the equal protection of the law.

(*f*) That the enforcement of said law will amount to the
141 taking of defendant's property without compensation and is in violation of the protection guaranteed to the defendant by the fourteenth amendment to the Constitution of the United States.

(*g*) That said Chapter 215, is repugnant to and violates the provisions of Section 21, of Article 3, of the Constitution of the state of South Dakota, which provides that no law shall imbrace more than one subject, which shall be expressed in its title, and is therefore null and void.

2.

That the Court erred and committed manifest error, in rendering judgment in favor of the plaintiff and against the defendant for twice the amount of the verdict; the same being allowed as double damages under the provisions of Chapter 215 of the Session Laws of the state of South Dakota for 1907. Defendant says the rendition and granting of said judgment was error, as the said Chapter 215 and the provisions thereof, are unconstitutional, null, and void.

Whereupon the defendant, petitioner herein, duly perfected an appeal from the whole and every part of said order and judgment, to the Supreme Court of the State of South Dakota, assigning the errors specified in the bill of exceptions and that of granting and allowing the motion for judgment on the verdict in a sum double the amount thereof, and duly presented and argued the same and demanded a reversal of said order allowing judgment on the verdict in double the amount thereof, and double the amount of actual damages and a reversal of the judgment rendered in said action.

V.

That thereafter upon a full consideration of matters the Supreme Court of the State of South Dakota affirmed the judgment appealed from and the order allowing motion for judgment on the verdict and entered its judgment thereon on the 3rd day of October, 1911, affirming the said judgment of the said Circuit Court of Lincoln County, in the State of South Dakota, and holding and adjudging that the said Chapter 215 of the Session Laws of South
142 Dakota for the year 1907, was not a violation of the Federal Constitution of the United States, and was a valid law in all respects, and in no manner was discriminatory nor did it deny the appellant the equal protection of the law, and was in no manner a violation of the 14th Amendment to the Constitution of the United States. That thereafter in due time the defendant petitioner duly

made and filed its application for rehearing in said case in the said Supreme Court of the State of South Dakota, urging that there was a Federal question involved in said action, and that the said Chapter 215 of the Session Laws of South Dakota for the year 1907 was a violation of the provisions of the Constituion of the United States, and fully presented the grounds urged in the original argument of said case involving a Federal question and in the said application for rehearing. All the points relating to a Federal question and specified in paragraph IV of this petition were urged and presented to said Supreme Court of the State of South Dakota. That said application for rehearing was denied on the 29th day of February, 1912, so that the said judgment has now become final in the Supreme Court of the State of South Dakota, from which there is no appeal or provision for further review. That in the said holdings and judgments of the said Supreme Court of South Dakota manifest error has happened to the great damage of your petitioner. That, although your petitioner in its answer in the said Circuit Court of Lincoln County, South Dakota, as also in its assignment of errors and in its brief filed in the said Supreme Court specially set up and claimed that a Federal question was involved and that the respondent, in law and as a matter of right, should not recover of defendant double damages for any loss occasioned by a fire as alleged in said complaint of plaintiff, and for other reasons involving a federal question plainly and clearly, yet, the decision of the said Supreme Court of South Dakota, as well as of said Circuit Court of Lincoln County in said State, was and is against the said right of appellant, so specially set forth
143 and alleged and claimed, and the said final judgment of the Supreme Court of South Dakota affirmed the said judgment of said Circuit Court, finally determining said action in favor of the respondent upon the merits.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota and the Judges thereof, to the end that the record in said action and matter may be removed into the Supreme Court of the United States and the error complained of by your petitioner may be examined and corrected, and the said judgment of the said Supreme Court of the State of South Dakota, be in all things reversed and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States; and your petitioner will ever pray.

Done this 15 day of March, 1912.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
By WILLIAM G. PORTER,
Its Duly Authorized Agent and Attorney.

WILLIAM G. PORTER,
Attorneys for said Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this 15 day of March, 1912, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed in the sum of One Thousand Dollars ($1000).

Dated at Pierre, South Dakota this 15 day of March, 1912.

J. H. McCOY,
Presiding Judge of the Supreme Court of the State of South Dakota.

144 [Endorsed:] Original. No. 2853. In the Supreme Court of the State of South Dakota, October 1911, Term. C. B. Kennedy, Plaintiff and Respondent, vs. C., M. & St. P. Ry. Co., Defendant and Appellant. Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota. Supreme Court, State of South Dakota. Filed Mar- 15, 1912. Frank Crane, Clerk.

145 And afterwards, to wit: on the same day, assignment of errors was filed, which in words and figures is as follows, to-wit:

146 In the Supreme Court of the State of South Dakota, October Term, 1911.

C. B. KENNEDY, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation, Defendant and Appellant.

Assignment of Errors.

Now comes the defendant and appellant, Chicago, Milwaukee and St. Paul Railway Company, by its Attorney, William G. Porter, and in connection with its petition for a writ of error, makes the following assignment of errors which the defendant avers occurred upon the trial of said cause, and says that in the record, proceedings, decision and judgment of the Supreme Court of South Dakota in the above entitled action and matter, there is manifest error in this, to-wit:

First. That the said Supreme Court of the State of South Dakota erred in determining the said cause and in rendering and entering judgment therein affirming the judgment of the Circuit Court of Lincoln County, in the State of South Dakota, wherein a verdict was rendered for the plaintiff and respondent and against the defendant and appellant for the sum of $100.00, and a judgment rendered and entered upon the said verdict in double the amount thereof, to-wit; in the sum of $200.00, together with interest thereon from July 20th, 1909 at the rate of 7 per cent. per annum, together with the sum of $81.85 costs and disbursements, and in holding and adjudging that plaintiff and respondent was entitled to recover and have judgment rendered for a sum double the amount of the verdict,

and in a sum double the actual damages and damages as fixed and assessed by the jury upon the trial of said action, and in adjudging and holding that the same was not in violation of and repug-
147 nant to the 14th Amendment to the Constitution of the United States; and that the same was not a denial to defendant and appellant thereunder of the equal protection of the law; and that the same was not taking defendant's and appellant's property without just compensation; and that the enforcement of the said law under which said action was brought, to-wit; Chapter 215 of the Session Laws of South Dakota for the year 1907, was not a violation of the protection guaranteed to defendant and appellant by the 14th Amendment to the Constitution of the United States; and that the same was not depriving defendant and appellant of its property without due process of law; and that the said judgment of the said Supreme Court depends upon and is based on, the said decision.

Second. That the said Supreme Court of the State of South Dakota, in determining said cause and in rendering the said judgment affirming the judgment of the said Circuit Court of Lincoln County, South Dakota, erred in this, to-wit; that although defendant and appellant, in its answer in the said Circuit Court of Lincoln County, averred, asserted and claimed as follows, to-wit; "That Chapter 215 of the Session Laws of the state of South Dakota for the year 1907, under which plaintiff seeks to recover double damages and damages double in the amount of those actually sustained, is unconstitutional, null, and void. That the said law referred to in paragraphs nine and ten of plaintiff's complaint, and the provisions thereof, and the whole of said law, to-wit: Chapter 215 of the Session Laws of 1907 of the state of South Dakota, are, on the face of the said law, unconstitutional, null and void, in this, to-wit:

1. That plaintiff seeks to deprive defendant of its property without due process of law.

2. That said law denies to defendant the equal protection of the laws.

3. That said law is repugnant to the fourteenth amendment to the constitution of the United States, and that plaintiff seeks thereunder to deprive defendant of its property without due pro-
148 cess of law.

4. That said law and the provisions thereof are repugnant to the fourteenth amendment of the Constitution of the United States, and that thereunder defendant is denied the equal protection of the laws.

5. That the enforcement thereof will amount to the taking of defendant's property without just compensation and is in violation of the protection guaranteed to the defendant by the fourteenth amendment to the Constitution of the United States;" and although upon the trial of said cause, and further, in its assignment of errors, and in its brief filed in said case in the said Supreme Court, and from the outset of the proceedings in said case, and throughout the same, and at each proper step, and covering the entire case, it was contended on behalf of defendant and appellant, and distinctly,

specifically and specially set up and asserted and claimed that a fedral right or immunity existed and was involved in said cause and litigation, and subject to protection under the constitution of the United States." Yet, the said decision of the said Supreme Court of South Dakota, as well as of the said Circuit Court of Lincoln County, was against the contention of defendant and appellant and against the said federal right or immunity so specifically and specially set up, asserted and claimed, and the said final judgment of said Supreme Court of the State of South Dakota is based upon the said decision.

Third. That the Supreme Court of South Dakota, in rendering and entering said final judgment affirming the judgment of the Circuit Court of said Lincoln County erred in this, to-wit; that although, under the pleadings and issues in said case, and upon the trial thereof in the said Circuit Court of Lincoln County, and in the Supreme Court of South Dakota, it was explicitly and continuously claimed by defendant and appellant, and specifically and specially set up and asserted and claimed in its brief and argument, and in all proceedings in the said case in said Supreme Court of the State of South Dakota, and in the application for rehearing in said Supreme Court, that the law, under which plaintiff and
149 respondent seeks to recover double damages and damages double the amount actually sustained, to-wit; Chapter 215 of the Session Laws of the State of South Dakota for the year 1907, is null and void and unconstitutional, and specifying as grounds and reasons therefor, the following:

1. That the said law is repugnant to the 14th Amendment to the Constitution of the United States, and that plaintiff and respondent seeks thereunder to deprive defendant and appellant of its property without due process of law.

2. That the said law, and the provisions thereof, are repugnant to the 14th Amendment to the Constitution of the United States, and that thereunder the defendant and appellant is denied the equal protection of the law.

3. That the enforcement thereof will amount to the taking of defendant's and appellant's property without just compensation and is in violation of the protection guaranteed to the defendant and appellant by the 14th Amendment to the Constitution of the United States.

4. The said law singles out corporations and requires them to pay in certain instances and cases, double damages to the party successfully suing them, while it gives no corresponding benefit, and that such a law seeks to punish this defendant and appellant for no wrong on account of negligence upon its part, yet the Supreme Court of the State of South Dakota held and decided against all the contentions and objections, duly and timely made, of the said defendant and appellant, and the said final judgment is based upon said decision.

Fourth. That the said Supreme Court of the State of South Dakota in determining said cause and in rendering judgment affirming the said judgment of the said Circuit Court of Lincoln County,

South Dakota, and in denying on the 29th day of February, 1912, defendant's and appellant's application for rehearing in said case, erred in this, to-wit; that this action, as fully appears by the pleadings therein and by the record, was brought in Lincoln County, South Dakota under Chapter 215 of the Session Laws of
150 the State of South Dakota for the year 1907 to recover double damages on account of the setting *out* of a fire and destroying certain personal property of plaintiff and respondent. That although, throughout said trial in the Circuit Court of Lincoln County, and in the presentation of the case before the Supreme Court of the State of South Dakota, and in all the proceedings from the outset to the determination of the said case in the Supreme Court of the State of South Dakota, and particularly in the application for rehearing of the said cause, defendant and appellant raised a federal question and right and urged upon the said Supreme Court the unconstitutionality of the said law and wherein it was in violation of the 14th Amendment to the Constitution of the United States, and at length and in particular in said application for rehearing, which was fully presented before the Court, yet said Court denied on the 29th day of February, 1912 the said federal question and right and that the said law of South Dakota was and is palpably in violation of the Constitution of the United States and the Supreme law of the land. Yet, notwithstanding presentation of said matters and a full consideration of the same by the said Supreme Court of the State of South Dakota, the said Supreme Court of the State of South Dakota decided against the said contentions of said defendant and appellant and the said judgment of said Supreme Court is predicated upon said decision. That the main and important and controlling question which was presented to the said Supreme Court of the State of South Dakota for determination upon the said appeal in said case, was the unconstitutionality of the said Chapter 215 of the Session Laws of the State of South Dakota for the year 1907, and that if the said Supreme Court, in express terms, did not pass upon the federal right or immunity specially set up of record in said cause, yet the necessary effect of the said final judgment of the said Supreme Court of the State of South Dakota is to deny a federal right or immunity specially set up and claimed and which, if recognized and enforced, would require a judgment different from one resting upon the ground of local or general law.

151 Fifth. The said Supreme Court of the State of South Dakota, in determining said cause, and in rendering and entering said judgment affirming the judgment of the said Circuit Court of Lincoln County, South Dakota, erred in this, to-wit: said Circuit Court of Lincoln County erred in rendering judgment therein over defendant's and appellant's objections, then and there made, seasonably and in due time, upon the hearing of the motion for judgment upon the verdict in double the amount of the same, and in a sum double the actual damages sustained. The said objections and reasons are as follows, to-wit:

1. That the alleged notice and affidavit served by plaintiff on

defendant's depot agent at Canton, South Dakota, more than sixty days prior to the commencement of this action, in which he sought to give defendant notice of his loss, fix the amount of his damage, and demand payment of the same, is wholly insufficient to authorize and entitle plaintiff to the double damages provided for by Chapter 215 of the Session Laws of South Dakota for the 1907.

2. That Chapter 215 of the Session Laws of the state of South Dakota for the year 1907, under which plaintiff seeks to recover double damages and double the amount of the verdict, is unconstitutional, null, and void. That the said law referred to in paragraphs nine and ten of plaintiff's complaint, and the provisions thereof, and the whole of said law, to-wit: Chapter 215 of the Session Laws of 1907 of the state of South Dakota are, on the face of the said law, unconstitutional, null, and void in this, to-wit:

(*a*) That plaintiff seeks, by means of said law, to deprive defendant of its property without due process of law.

(*b*) That said law denies to defendant the equal protection of the laws.

(*c*) That said law is repugnant to the fourteenth amendment to the Constitution of the United States, and that plaintiff seeks thereunder to deprive defendant of its property without due process of law.

(*d*) That said law and the provisions thereof are repugnant to the fourteenth amendment to the Constitution of the United
152 States, in that thereunder defendant is denied the equal protection of the laws.

(*e*) That the enforcement of said law will amount to the taking of defendant's property without just compensation and is in violation of the protection guaranteed to the defendant by the fourteenth amendment to the constitution of the United States.

3. That said Chapter 215 of the Session Laws of the state of South Dakota for the year 1907, is repugnant to and violates the provisions of Section 21, of Article 3, of the Constitution of the state of South Dakota, which provides that no law shall embrace more than one subject, which shall be expressed in its title, and is therefore null and void.

Erred in sustaining plaintiff's motion for judgment over the objections of defendant and appellant, as last above fully set forth, and in rendering judgment in the sum of $281.85, the same being double the amount of the verdict and the actual damages claimed to have been sustained by the plaintiff and respondent, together with interests and costs from the date of the verdict; erred in making the intermediate order upon motion of plaintiff and respondent that judgment be allowed and granted on the verdict for double the amount of the same, besides costs, under the provisions of Chapter 215 of the Session Laws of the state of South Dakota for the year 1907; erred in making and entering the said order for double the actual damages and double the amount of the verdict, and in making and entering a judgment for double the amount of the verdict, and in an amount double the actual damages sustained; and the Supreme Court of the State of South Dakota erred in affirming and approving

the said decisions and orders and rulings and judgments of the said Circuit Court of Lincoln County, South Dakota, for the reasons therein duly specified and assigned, and for the reasons hereinbefore specified and assigned.

Sixth. For all the reasons hereinbefore specified and assigned, the said judgment of said Circuit Court, fixing the damages in a sum double the verdict in said case, and double the amount of the actual damages sustained, and the said judgment of the said Su-
153 preme Court of the State of South Dakota, are erroneous and contrary to law and contrary to the 14th Amendment to the Constitution of the United States, and in violation of the federal rights or immunities guaranteed by the Constitution of the United States to the said defendant and appellant, and each should be vacated and set aside, and the said Supreme Court of the State of South Dakota should have reversed said judgment of the said Circuit Court and the order granting and allowing plaintiff and respondent to take judgment upon the verdict in a sum double the amount of the verdict, and in a sum double the actual damages sustained by plaintiff and respondent.

Wherefore the said defendant and appellant prays that said judgment and the decision of the Supreme Court of the State of South Dakota may be reversed, set aside and annulled, and that the defendant and respondent may be restored to all things which it hath lost by the action and because of said decision and judgment.

WILLIAM G. PORTER,
Attorneys for Defendant and Appellant.

154 [Endorsed:] Original. No. 2853. In the Supreme Court of the State of South Dakota, October 1911 Term. C. B. Kennedy vs. C. M. & St. P. Ry. Co. Assignment of Errors. Supreme Court, State of South Dakota. Filed Mar. 15 1912. Frank Crane, Clerk.

155 And afterwards, to wit: on the same day, bond on appeal was filed, which in words and figures is as follows, to wit:

156 In the Supreme Court of the United States.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
C. B. KENNEDY, Defendant in Error.

Bond on Writ of Error from Supreme Court of the United States to Supreme Court of State of South Dakota.

Know All Men by These Presents: That we, Chicago, Milwaukee and St. Paul Railway Company, a Corporation, as principal, and Frank B. Gannon and Frank G. Suttle, as sureties, are held and firmly bound unto C. B. Kennedy, defendant in error, in the sum

of One Thousand Dollars ($1,000) to be paid to the said obligee, his successors, representatives and assigns; for the payment of which, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of March, 1912.

Whereas, the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of South Dakota;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute *his* said writ of error to effect and answer all costs and damages if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
By WILLIAM G. PORTER,
Its Duly Authorized Agent and Attorney.
FRANK B. GANNON.
FRANK G. SUTTLE.

Signed, sealed and delivered in presence of

E. L. GRANTHAM.
M. O. DRAEGER.

157 STATE OF SOUTH DAKOTA,
County of Brown, ss:

Be it remembered that on this 8th day of March, 1912, before me, Fred H. Gannon, a Notary Public within and for said County and State, personally appeared William G. Porter, known to me to be the duly authorized agent and attorney in fact of the Chicago, Milwaukee and St. Paul Railway Company, a Corporation, that is described in and that executed the within instrument and duly acknowledged to me that such corporation executed the same.

In witness whereof I have hereunto subscribed my name and affixed my official seal at Aberdeen, in said County and State the day and year last above written.

[Seal Fred H. Gannon, Notary Public, South Dakota.]

FRED H. GANNON,
Notary Public in and for said County and State.

STATE OF SOUTH DAKOTA,
County of Brown, ss:

Be it remembered that on this 8th day of March, 1912, before me, Fred H. Gannon, a Notary Public within and for said County and State, personally appeared Frank B. Gannon and Frank G. Suttle, known to me to be the persons who are described in and who exe-

cuted the foregoing bond, and severally duly acknowledged to me that they executed the same as their free and voluntary act and deed.

In witness whereof I have hereunto subscribed my name and affixed my official seal at Aberdeen in the said County and State the day and year last above written.

[Seal Fred H. Gannon, Notary Public, South Dakota.]

FRED H. GANNON,
Notary Public in and for said County and State.

158 STATE OF SOUTH DAKOTA,
County of Brown, ss:

Frank B. Gannon and Frank G. Suttle, being severally duly sworn, each for himself and not one for the other, upon his oath says: The said Frank B. Gannon for himself says that he is a resident and free holder within the State of South Dakota and that he is worth the sum of Two Thousand Dollars ($2000) over and above all his debts and liabilities, in property within said State of South Dakota not by law exempt from execution; and the said Frank G. Suttle for himself says that he is a resident and free holder within the State of South Dakota and that he is worth the sum of Two Thousand Dollars ($2000) over and above all his debts and liabilities, in property within said State of South Dakota not by law exempt from execution. And the said affiants do further say that they are the sureties named in and who executed the foregoing bond and that they reside at Aberdeen in said County and State.

FRANK B. GANNON.
FRANK G. SUTTLE.

Subscribed and sworn to before me this 8th day of March, 1912.

[Seal Fred H. Gannon, Notary Public, South Dakota.]

FRED H. GANNON,
Notary Public in and for said County and State.

I hereby approve the foregoing bond and sureties this 15 day of March, 1912.

J. H. McCOY,
Presiding Judge of the Supreme Court of the State of South Dakota.

159 [Endorsed.] Original. No. 2853. In the Supreme Court of the United States. C., M. & St. P. Ry. Co., Plaintiff in Error, vs. C. B. Kennedy, Defendant in Error. Bond on Writ of Error from Supreme Court of the United States to Supreme Court of the State of South Dakota. Supreme Court, State of South Dakota. Filed Mar. 15, 1912. Frank Crane, Clerk.

160 And afterwards, to wit; on the same day, a citation by the Presiding Judge of the Supreme Court of the State of South Dakota was filed, which in words and figures is as follows, to wit:

161 UNITED STATES OF AMERICA, *ss:*

To C. B. Kennedy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of South Dakota, wherein the Chicago, Milwaukee and St. Paul Railway Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White Chief Justice of the United States, this 15 day of March, in the year of our Lord, One Thousand Nine Hundred and Twelve.

J. H. McCOY,
Presiding Judge of the Supreme Court of the State of South Dakota.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that I served the within Citation on the therein named C. B. Kennedy at Canton, S. D., on the 23rd day of March, A. D., 1912 by handing to and leaving with him a true copy thereof.

I further certify and return that I served the within Citation on Arthur Brown, attorney for the within named C. B. Kennedy, at Canton, S. D., on the 23rd day of March, A. D., 1912 by handing to and leaving with him a true copy thereof.

Dated at Sioux Falls, S. D., this 23rd day of March, A. D., 1912.

SETH BULLOCK,
United States Marshal, South Dakota,
By JERRY CARLETON, *Deputy.*

Marshal's fees	$4.00
" expense	1.54
Total	$5.54

162 [Endorsed:] Original. No. 2853. In the Supreme Court of the State of South Dakota, October, 1911, Term. C. B. Kennedy, Plaintiff and Respondent, vs. C., M. & St. P. Ry. Co., Defendant and Appellant. Citation. Supreme Court, State of South Dakota. Filed Mar. 15, 1912. Frank Crane, Clerk. Dist. of South Dakota. Received Mar. 21, 1912. Office of United States Marshal.

163 And afterwards, to wit; on the same day, order allowing writ of error from the Supreme Court of the United States to the Supreme Court of The State of South Dakota was issued, which in words and figures is as follows, to wit:

164 In the Supreme Court of the State of South Dakota, October, 1911, Term.

C. B. KENNEDY, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation, Defendant and Appellant.

Order Allowing Writ of Error from the Supreme Court of the United States to Supreme Court of South Dakota.

The above entitled matter and cause coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota, and upon examination and filing of said petition and the record in said matter, together with the said petitioner's assignment of errors, and desiring to give the said petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered, that a writ of error be, and is hereby allowed to this court from the Supreme Court of the United States and that the bond presented by said petitioner be, and the same is hereby, approved.

Done at Pierre, in the State of South Dakota, this 15 day of March, A. D., 1912.

[Seal Supreme Court, State of South Dakota.]

J. H. McCOY,
Presiding Judge of the Supreme Court of the State of South Dakota.

Attest:

FRANK CRANE,
By LESLIE PARRY, *Deputy.*

165 [Endorsed:] Original. No. 2853 In the Supreme Court of the State of South Dakota, October, 1911, Term. C. B. Kennedy, Plaintiff and Respondent, vs. C., M. & St. P. Ry. Co., Defendant and Appellant. Order Allowing Writ of Error from the Supreme Court of the United States to Supreme Court of South Dakota. Supreme Court, State of South Dakota. Filed Mar. 15, 1912. Frank Crane, Clerk.

166 And afterwards, to wit; on the eighteenth day of March, A. D. One Thousand Nine Hundred Twelve, writ of error was filed, which in words and figures is as follows, to wit:

167 In the Supreme Court of the State of South Dakota.

C. B. KENNEDY, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation, Defendant and Appellant.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of South Dakota, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between C. B. Kennedy, plaintiff and respondent, and the Chicago, Milwaukee and St. Paul Railway Company, defendant and appellant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution,
168 treaty, statute or commission, a manifest error hath happened to the great damage of the said defendant and appellant as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done, therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 15th day of March, in the year of our Lord, One Thousand Nine Hundred and Twelve.

[U. S. Dist. Court Seal, Dist. of South Dakota. Sioux Falls.]

OLIVER S. PENDAR,
Clerk of the District Court of the United States for the District of South Dakota,
By ODIN R. DAVIS, *Deputy.*

Allowed by:

J. H. McCOY,
Presiding Judge of the Supreme Court of the State of South Dakota.

[Seal Supreme Court, State of South Dakota.]

Attest:

FRANK CRANE, *Clerk,*
By LESLIE PARRY, *Deputy.*

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that I served the within Writ of Error on C. B. Kennedy, Plaintiff and Respondent, at Canton, S. D., on the 23rd day of March, A. D., 1912 by handing to and leaving with him a true copy thereof.

I further certify and return that I served the within Writ of Error on Arthur Brown, attorney for C. B. Kennedy, Plaintiff and Respondent, at Canton, S. D., on the 23rd day of March, A. D., 1912 by handing to and leaving with him a true copy thereof.

Dated at Sioux Falls, S. D., this 23rd day of March, A. D., 1912.

SETH BULLOCK,
United States Marshal,
By JERRY CARLETON, *Deputy.*

Marshal's fees, $4.00.

169 [Endorsed:] 2853. Dist. of South Dakota. Received Mar. 21, 1912. Office of United States Marshal. Supreme Court, State of South Dakota. Filed Mar. 18, 1912. Frank Crane, Clerk.

170 And I further certify that the within and foregoing papers are true copies and original papers filed in this court in No. 2853, in which C. B. Kennedy is Plaintiff and Respondent, and Chicago, Milwaukee & St. Paul Railway Company, a Corporation, is Defendant and Appellant.

[Seal Supreme Court, State of South Dakota.]

FRANK CRANE,
Clerk of Supreme Court, State of South Dakota.

171 In the Supreme Court of the United States, October Term, 1911.

No. 1111.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

C. B. KENNEDY, Defendant in Error.

Statement of the Errors on Which Plaintiff in Error Intends to Rely.

And now comes the Chicago, Milwaukee & St. Paul Railway Company, plaintiff in error, by its counsel in the above stated case, and files this statement of the errors on which it intends to rely, and says that in the record and proceedings in the aforesaid cause there is manifest error in this, to-wit:

First. That the said Supreme Court of the State of South Dakota erred in determining the said cause and in rendering and entering judgment therein affirming the judgment of the Circuit Court of Lincoln County, in the State of South Dakota, wherein a verdict was rendered for the defendant in error and against the plaintiff in error for the sum of $100.00, and a judgment rendered and entered upon the said verdict in double the amount thereof, to-wit; in the sum of $200.00, together with interest thereon from July 20th, 1909 at the rate of 7 per cent. per annum, together with the sum of $81.85 costs and disbursements, and in holding and adjudging that defendant in error was entitled to recover and have judgment rendered for a sum double the amount of the verdict, and in a sum double the actual damages and damages as fixed and assessed by the jury upon the trial of said action, and in adjudging and holding that the same was not in violation of and repugnant to the 14th Amendment to the Constitution of the United States; and that the same was not a denial to plaintiff in error thereunder of the equal protec-

172 tion of the law; and that the same was not taking plaintiff in error's property without just compensation; and that the enforcement of the said law under which said action was brought, to-wit; Chapter 215 of the Session Laws of South Dakota for the year 1907, was not a violation of the protection guaranteed to plaintiff in error, by the 14th Amendment to the Constitution of the United States; and that the same was not depriving plaintiff in error of its property without due process of law; and that the said judgment of the said Supreme Court depends upon and is based on the said decision.

Second. That the said Supreme Court of the State of South Dakota, in determining said cause and in rendering the said judgment affirming the judgment of the said Circuit Court of Lincoln County, South Dakota, erred in this, to-wit: that although plaintiff in error, in its answer in the said Circuit Court of Lincoln County averred, asserted and claimed as follows, to-wit; "That Chapter 215 of the Session Laws of the state of South Dakota for the year 1907, under

which defendant in error seeks to recover double damages and damages double in the amount of those actually sustained, is unconstitutional, null, and void; that, although the said law referred to in paragraphs nine and ten of the complaint of defendant in error, and the provisions thereof, and the whole of said law, to-wit: Chapter 215 of the Session Laws of 1907 of the State of South Dakota, are, on the face of the said law, unconstitutional, null and void, in this, to-wit:

1. That defendant in error seeks to deprive plaintiff in error of its property without due process of law.

2. That said law denies to plaintiff in error the equal protection of the laws.

3. That said law is repugnant to the fourteenth amendment to the constitution of the United States, and that defendant in error seeks thereunder to deprive plaintiff in error of its property without due process of law.

4. That said law and the provisions thereof are repugnant to the fourteenth amendment of the Constitution of the United States, and that thereunder plaintiff in error is denied the equal protection of the laws.

173 5. That the enforcement thereof will amount to the taking of the property of plaintiff in error without just compensation and is in violation of the protection guaranteed to the defendant by the fourteenth amendment to the Constitution of the United States;" yet, the said decision of the said Supreme Court of South Dakota, as well as of the said Circuit Court of Lincoln County, was against the contention of plaintiff in error and against the said federal right, or immunity, so specifically and specially set up, asserted and claimed, and the said final judgment of said Supreme Court of the State of South Dakota is based upon the said decision. Although, upon the trial of said cause, and further, in its assignment of errors, and in its brief filed in said case in the said Supreme Court, and from the outset of the proceedings in said case, and throughout the same, and at each proper step, and covering the entire case, it was contended on behalf of plaintiff in error, and, distinctly, specifically and specially set up and asserted and continuously claimed that a federal right or immunity existed and was involved in said cause and litigation, and subject to protection under the constitution of the United States; yet, the said decision of the said Supreme Court of South Dakota, as well as of the said Circuit Court of Lincoln County, was against the contention of plaintiff in error and against the said federal right, or immunity, so specifically and specially set up, asserted and claimed, and the said final judgment of said Supreme Court of the State of South Dakota is based upon the said decision.

Third. That the Supreme Court of South Dakota, in rendering and entering said final judgment affirming the judgment of the Circuit Court of said Lincoln County erred in this, to-wit; that although under the pleadings and issues in said case and upon the trial thereof in the said Circuit Court of Lincoln County, and in the Supreme Court of South Dakota, it was explicitly and continuously claimed by plaintiff in error and specifically and specially set up and

asserted and claimed in its brief and argument, and in all proceedings in the said case in said Supreme Court of the State of South Dakota, and in the application for rehearing in said Supreme
174 Court, that the law, under which defendant in error seeks to recover double damages and damages double the amount actually sustained, to-wit; Chapter 215 of the Session Laws of the State of South Dakota for the year 1907, is null and void and unconstitutional, and specifying as grounds and reasons therefor, the following:

1. That the said law is repugnant to the 14th Amendment to the Constitution of the United States, and that defendant in error seeks thereunder to deprive plaintiff in error of its property without due process of law.

2. That the said law, and the provisions thereof, are repugnant to the 14th Amendment to the Constitution of the United States, and that thereunder the plaintiff in error is denied the equal protection of the law.

3. That the enforcement thereof will amount to the taking of plaintiff in error's property without just compensation and is in violation of the protection guaranteed to the plaintiff in error by the 14th Amendment to the Constitution of the United States.

4. The said law singles out corporations and requires them to pay in certain instances and cases, double damages to the party successfully suing them, while it gives no corresponding benefit, and that such a law seeks to punish this plaintiff in error for no wrong on account of negligence upon its part—yet, the Supreme Court of the State of South Dakota held and decided against all the contentions and objections, duly and timely made, of the said plaintiff in error, and the said final judgment is based upon said decision.

Fourth. That the said Supreme Court of the State of South Dakota in determining said cause and in rendering judgment affirming the said judgment of the said Circuit Court of Lincoln County, South Dakota, and in denying, on the 29th day of February, 1912, plaintiff in error's application for rehearing in said case, erred in this, to-wit; although throughout said trial in the Circuit Court of Lincoln County and in the presentation of the case before the Supreme Court of the State of South Dakota, and in all pro-
175 ceedings from the outset to the determination of the said case in the Supreme Court of the State of South Dakota, and particularly in the application for rehearing of the said cause, plaintiff in error raised a federal question and right urging the unconstitutionality of the said law and wherein it was in violation of the 14th Amendment to the Constitution of the United States, the said Supreme Court denying, on the 29th day of February, 1912, the said federal question and right and that the said law of South Dakota was and is in violation of the Constitution of the United States and the Supreme law of the land; yet, notwithstanding the presentation of said matters and a full consideration of the same by the said Supreme Court of the State of South Dakota, the said Supreme Court of the State of South Dakota decided against the said contentions of said plaintiff in error and the said judgment of said Supreme Court is predicated upon said decision. The the main and important

and controlling question which was presented to the said Supreme Court of the State of South Dakota for determining upon the said appeal in said case, was the unconstitutionality of the said Chapter 215 of the Session Laws of the State of South Dakota for the year 1907, and that if the said Supreme Court, in express terms, did not pass upon the federal right, or immunity, specially set up of record in said cause, yet the necessary effect of the said final judgment of the said Supreme Court of the State of South Dakota is to deny a federal right or immunity specially set up and claimed and which, if recognized, and enforced, would require a judgment different from one resting upon the ground of local or general law.

Fifth. The said Supreme Court of the State of South Dakota, in determining said cause, and in rendering and entering said judgment affirming the judgment of the said Circuit Court of Lincoln County, South Dakota, erred in this, to-wit; said Circuit Court of Lincoln County erred in rendering judgment therein over objections of plaintiff in error, then and there made, seasonably and in due time, upon the hearing of the motion for judgment upon the verdict in double the amount of the same, and in a sum double the
176 actual damages sustained. The said objections and reasons are as follows, to-wit:

1. That the alleged notice and affidavit served by defendant in error on plaintiff in error's depot agent at Canton, South Dakota, more than sixty days prior to the commencement of this action, in which he sought to give plaintiff in error notice of his loss, fix the amount of his damage, and demand payment of the same, is wholly insufficient to authorize and entitle defendant in error to the double damages provided for by Chapter 215 of the Sessions Laws of South Dakota for the year 1907.

2. That Chapter 215 of the Session Laws of the State of South Dakota for the year 1907, under which defendant in error seeks to recover double damages and double the amount of the verdict, is unconstitutional, null and void. That the said law referred to in paragraph nine and ten of defendant in error's complaint, and the provisions thereof, and the whole of said law, to-wit: Chapter 215 of the Session Laws of 1907 of the state of South Dakota are, on the face of the said law, unconstitutional, null, and void in this, to-wit:

(*a*) That defendant in error seeks, by means of said law, to deprive plaintiff in error of its property without due process of law.

(*b*) That said law denies to plaintiff in error the equal protection of the laws.

(*c*) That said law is repugnant to the fourteenth amendment to the Constitution of the United States, and that defendant in error seeks thereunder to deprive plaintiff in error of its property without due process of law.

(*d*) That said law and the provisions thereof are repugnant to the fourteenth amendment to the Constitution of the United States, in that thereunder plaintiff in error is denied the equal protection of the laws.

(*e*) That the enforcement of said law will amount to the taking of plaintiff in error's property without just compensation and is in

violation of the protection guaranteed to plaintiff in error by the fourteenth amendment to the constitution of the United States.

Erred in sustaining defendant in error's motion for judg-
177 ment over the objections of plaintiff in error, as last above fully set forth, and in rendering judgment in the sum of $281.85, the same being double the amount of the verdict and the actual damages claimed to have been sustained by defendant in error together with interest and costs from the date of the verdict; erred in making the intermediate order upon motion of defendant in error that judgment be allowed and granted on the verdict for double the amount of the same, besides costs under the provisions of Chapter 215 of the Session Laws of the State of South Dakota for the year 1907; erred in making and entering the said order for double the actual damages and double the amount of the verdict, and in making and entering a judgment for double the amount of the verdict, *and in making and entering a judgment for double the amount of the verdict,* and in an amount double the actual damages sustained; and the Supreme Court of the State of South Dakota erred in affirming and approving the said decisions and orders and rulings and judgments of the said Circuit Court of Lincoln County, South Dakota, for the reasons therein duly specified and assigned, and for the reasons hereinbefore specified and assigned.

Sixth. For all the reasons hereinbefore specified and assigned the said judgment of said Circuit Court, fixing the damages in a sum double the verdict in said case, and double the amount of the actual damages sustained, and the said judgment of the said Supreme Court of the State of South Dakota, are erroneous and contrary to law and contrary to the 14th Amendment to the Constitution of the United States, and in violation of the federal rights or immunities guaranteed by the Constitution of the United States to the said plaintiff in error, and each should be vacated and set aside, and the said Supreme Court of the state of South Dakota should have reversed said judgment of the said Circuit Court and the order granting and allowing defendant in error to take judgment upon the verdict in a sum double the amount of the verdict, and in a sum double the actual damages sustained by defendant in error.

178 Wherefore the said plaintiff in error prays that said judgment and the decision of the Supreme Court of the State of South Dakota may be reversed, set aside and annulled, and that the said plaintiff in error may be restored to all things which it hath lost by the action and because of the said decision and judgment.

BURTON HANSON,
WILLIAM G. PORTER,
Attorneys for Plaintiff in Error.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that I served the within Statement of Errors on C. B. Kennedy, Defendant in Error and on Arthur Brown, attorney for Defendant in Error, at Canton, South Dakota,

on this 17th day of June, A. D. 1912, by handing to and leaving with each of them personally a true copy thereof.

SETH BULLOCK,
United States Marshal,
By H. F. CHAPMAN,
Deputy.

179 [Endorsed:] 632–12. 23187. Original. No. 1111. In the Supreme Court of the United States for the October, 1911, term. C. M. & St. P. Ry. Co., Plaintiff in Error, vs. C. B. Kennedy, Defendant in Error. Statement of the Errors on which Plaintiff in Error intends to Rely. Office of the Clerk, Supreme Court U. S. Received Jul- 5, 1912.

180 In the Supreme Court of the United States, October, 1911, Term.

No. 1111.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
C. B. KENNEDY, Defendant in Error.

Statement of the Parts of the Record Which the Plaintiff in Error Thinks Necessary for the Consideration of the Errors on Which it Intends to Rely.

And now comes the Chicago, Milwaukee & St. Paul Railway Company, Plaintiff in Error, by its counsel in the above stated case, and files and serves this statement of the parts of the record which the said Plaintiff in Error thinks necessary for the consideration of the errors on which it intends to rely, and said Plaintiff in Error hereby requests the Clerk of the said Court to cause to be printed the following parts of the record, to-wit:

Writ of error, with proof of service thereof; citation in error, with proof of service thereof; petition for writ of error; assignment of errors; bonds on writ of error; order allowing writ of error; clerk's certificate and return to writ of error; the printed abstract filed by the said plaintiff in error as appellant in the Supreme Court of the State of South Dakota on its appeal to that Court from the judgment and order of the Circuit Court of Lincoln County in said State, and containing 32 pages, exclusive of the index thereto; the printed brief filed by the said plaintiff in error as appellant in the Supreme Court of the State of South Dakota on said appeal; opinion of the Supreme Court of the State of South Dakota, filed on said appeal on October 3rd, 1911; judgment of the Supreme Court of the State of South Dakota, filed and entered on said appeal October 3rd, 1911; petition for rehearing filed by plaintiff
181 in error on November 3rd, 1911; certificate of Clerk of Supreme Court of the State of South Dakota certifying that

cause No. 2853, Kennedy vs. Chicago, Milwaukee and St. Paul Railway Company, was on the 29th day of February, 1912, called in open court on petition for rehearing and the said petition was denied in open court; that same is now of record in the Supreme Court of the State of South Dakota; that no written order, denying petition, was handed down and that a record of said proceeding is found on page 74 of journal No. 6, of the Supreme Court of the State of South Dakota, together with the endorsements and filings upon the said several records and papers.

Annexed hereto is a statement of the errors on which said plaintiff in error intends to rely.

Dated at Aberdeen, South Dakota, this 8th day of June, A. D. 1912.

BURTON HANSON,
WILLIAM P. PORTER,
Attorneys for Plaintiff in Error.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that I served the within Statement of Record on C. B. Kennedy, Defendant in Error, and on Arthur Brown, attorney for Defendant in Error, at Canton, South Dakota, this 17th day of June, A. D. 1912, by handing to and leaving with each of them personally a true copy thereof.

SETH BULLOCK,
United States Marshal,
By H. F. CHAPMAN, *Deputy.*

182 [Endorsed:] 632–12. 23187. Original. No. 1111. In the Supreme Court of the United States, October, 1911, Term. C. M. & St. P. Ry. Co., Plaintiff in Error, vs. C. B. Kennedy, Defendant in Error. Statement of the parts of the record which the Plaintiff in Error thinks necessary for the consideration of the errors on which it intends to rely.

183 [Endorsed:] File No. 23,187. Supreme Court U. S., October Term, 1912. Term No. 632. Chicago, Milwaukee & St. Paul Ry. Co., a corporation, Pl'ff in Error, vs. C. B. Kennedy. Statement of errors and designation by plaintiffs in error of parts of record to be printed and proof of service of same. Filed July 5, 1912.

Endorsed on cover: File No. 23,187. South Dakota Supreme Court. Term No. 632. Chicago, Milwaukee & St. Paul Railway Company, plaintiff in error, vs. C. B. Kennedy. Filed April 27th, 1912. File No. 23,187.

Supreme Court of the United States

OCTOBER TERM, 1913, No. 246

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR

vs.

C. B. KENNEDY

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

SUBJECT INDEX

LIST OF CASES CITED

Supreme Court of the United States

OCTOBER TERM, 1913, No. 246

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR

vs.

C. B. KENNEDY

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

I

STATEMENT OF THE CASE

This is a writ of error to the Supreme Court of the state of South Dakota to review a judgment of that court, affirming a judgment of the Circuit Court in and for Lincoln county, state of South Dakota, which was rendered in favor of the defendant in error for double the amount of his damages, fixed and assessed by the jury as prescribed by Chapter 215 of the Session Laws of South Dakota for the year 1907.

The defendant in error alleges that the plaintiff in error is a corporation and common carrier and was on the 13th day of October, 1908, the owner of and operating a railroad across the land of the defendant in error; that on said date the plaintiff in error negligently allowed fire to escape from the locomotive engine being operated by the plaintiff in error, which was communicated to and burned over the premises of the defendant in error, destroying his property of the value of $800.00; that on the 16th day of October, 1908, the defendant in error notified the plaintiff in error in writing, accompanied by his affidavit of the loss, as required by Chapter 215 of the Session Laws of South Dakota for the year 1907; that more than 60 days had elapsed since the service of the notice and affidavit, and the plaintiff in error had neither paid nor settled the loss, as provided by Chapter 215 of the Session Laws of South Dakota for the year 1907, and the plaintiff brings this action under the said section and chapter, and seeks to recover double the amount of his damage as stated. (Record pp. 1-4.)

The defendant, answering the complaint, denies generally the

allegations thereof and the damage alleged to have been suffered by the defendant in error, and further alleges that Chapter 215 of the Session Laws of South Dakota for the year 1907, under which the plaintiff seeks double damages, is unconstitutional, null and void; that the provisions thereof referred to in the complaint, and the whole of said law is unconstitutional, null and void, in that the defendant in error seeks to deprive plaintiff in error of its property without due process of law; that said law denies to plaintiff in error the equal protection of the laws; that said law is repugnant to the fourteenth amendment of the constitution of the United States, and that defendant in error seeks thereunder to deprive plaintiff in error of its property without due process of law; that the said law and the provisions thereof are repugnant to the fourteenth amendment of the constitution of the United States, and that thereunder the plaintiff in error is denied the equal protection of the laws; that the enforcement thereof will amount to the taking of the property of plaintiff in error without just compensation, and is in violation of the protection guaranteed to the plaintiff in error by the fourteenth amendment to the constitution of the United States. (Record pp. 1-5.)

Upon the trial the jury returned a verdict for the defendant in error, assessing his damages in the sum of $100.00. (Record p. 8.)

Thereafter, upon motion of defendant in error, the court entered judgment upon said verdict for double the amount of damages assessed by the jury, with interest and costs, over the objection of the plaintiff in error, for the sum of $200.00. (Record pp. 8-12.)

To which judgment the plaintiff in error duly excepted. That thereafter exceptions to the verdict and judgment thereon were duly allowed and settled by the judge of said court. (Record pp. 12-14.)

That thereafter the plaintiff in error served its notice of appeal and undertaking on appeal and perfected its appeal to the Supreme Court of the state of South Dakota. (Record pp. 16-18.)

That thereafter and on the 3d day of October, 1911, an opinion and judgment was handed down by the Supreme Court of the state of South Dakota, affirming in all things the judgment and order appealed from. (Record pp. 18-23.)

That thereafter and on the 30th day of October, 1911, the plaintiff in error duly filed and presented its petition for a re-

hearing to the Supreme Court of the state of South Dakota. (Record pp. 24-26.)

And thereafter and on the 1st day of April, 1912, said petition for rehearing was by the Supreme Court of the state of South Dakota duly denied. (Record p. 27.)

And thereafter and on the 15th day of March, 1912, the plaintiff in error presented to the Supreme Court of the state of South Dakota its petition for writ of error to the Supreme Court of the state of South Dakota, alleging, among other things, that in the said holdings and judgment of the Supreme Court of South Dakota manifest error has happened to the petitioner, plaintiff in error; that although plaintiff in error in its answer in said Circuit Court of Lincoln county, South Dakota, as also in its assignment of errors and in its brief filed in said Supreme Court, specially set up and claimed that a federal question was involved and that the defendant in error in law and as a matter of right, should not recover of plaintiff in error double damages and damages in excess of actual damages for any loss occasioned by fire, as alleged in said complaint of defendant in error, and for other reasons involving a federal question plainly and clearly. Yet the decision of the said Supreme Court of South Dakota, as well as of said Circuit Court of Lincoln county in said state, was against the rights of plaintiff in error, so as aforesaid specially set forth and alleged and continuously claimed, and the said final judgment of the Supreme Court of South Dakota affirmed the said judgment of said Circuit Court, finally determining said action in favor of the defendant in error upon the merits. (Record pp. 27-32.)

And writ of error thereon was by the Supreme Court duly allowed. (Record p. 32.)

And the plaintiff in error thereafter presented and filed its assignment of errors upon said writ of error. (Record pp. 32-37.)

Thereafter plaintiff in error duly furnished and filed its bond on writ of error, which was duly approved. (Record pp. 37-39.)

And thereupon a citation was duly issued to the defendant in error and personally served upon him. (Record pp. 39-40.)

And thereafter writ of error was duly allowed. (Record p. 41.)

And thereafter writ of error to the Supreme Court of South Dakota was duly issued and served. (Record pp. 42-43.)

Plaintiff in error thereafter duly made, served and filed its statement of errors upon which plaintiff in error relies for a reversal of the judgment appealed from, asserting that Chapter 215 of the Session Laws of South Dakota for the year 1907 is unconstitutional and void to the extent that it authorizes a recovery of double the amount of actual damages sustained, particularly as follows:

First: That the said law is repugnant to the fourteenth amendment to the constitution of the United States, and that defendant in error seeks thereunder to deprive plaintiff in error of its property without due process of law, and the Supreme Court of the state of South Dakota erred in affirming the judgment of the Circuit Court of Lincoln county under the provisions thereof.

Second: That said law is unconstitutional, null and void, wherein it authorizes the recovery of double damages and damages double the amount of those actually sustained; and that the court erred in affirming the judgment of the Circuit Court of Lincoln county, entering judgment for double damages thereunder, for that thereunder the defendant in error seeks to deprive plaintiff in error of its property without due process of law; that said law denies to plaintiff in error the equal protection of the laws, and that the provisions of said law are repugnant to the fourteenth amendment of the constitution of the United States, and thereunder plaintiff in error is denied the equal protection of the laws; that the enforcement of said judgment will amount to the taking of the property of the plaintiff in error without just compensation and is in violation of the protection guaranteed to the plaintiff in error by the fourteenth amendment to the constitution of the United States, so that the Supreme Court of the state of South Dakota erred in affirming said decision of the Circuit Court of Lincoln county against the contention of plaintiff in error and against a federal right or immunity so specifically set up, asserted and continuously claimed.

Third: That the Supreme Court of South Dakota in rendering and entering its judgment affirming the judgment of the Circuit Court of Lincoln county, erred in this, that although under the pleadings and issues and upon the trial thereof in the said Circuit Court of Lincoln county, and in the Supreme Court of South Dakota, it was explicitly and continuously claimed by plaintiff in error in its brief and argument and in all proceedings in said case in the Supreme Court of South Dakota, that the law, under which defendant in error seeks to recover double damages, is unconstitutional,

null and void, specifying as grounds therefor that the law is repugnant to the fourteenth amendment to the constitution of the United States, and that defendant in error seeks thereunder to deprive plaintiff in error of its property without due process of law; that the plaintiff in error is denied the equal protection of the laws; that the enforcement thereof will amount to the taking of the property of plaintiff in error without just compensation, and is in violation of the protection guaranteed to the plaintiff in error by the fourteenth amendment to the constitution of the United States; that said law singles out corporations and requires them to pay in certain instances and cases double damages to the party successfully suing them, while it gives no corresponding benefit, and that such law seeks to punish the plaintiff in error for no wrong or act of negligence on its part; yet, the Supreme Court of the state of South Dakota held and decided against all the contentions and objections duly and timely made by the said plaintiff in error, and said final judgment is based upon said decision.

Fourth: That the said Supreme Court of the state of South Dakota, in rendering judgment affirming the said judgment of the Circuit Court of Lincoln county, South Dakota, and denying the application of plaintiff in error for rehearing, erred in this: that in all proceedings herein before the Circuit Court of Lincoln county and before the Supreme Court of the state of South Dakota, plaintiff in error urged the unconstitutionality of said law wherein it was in violation of the fourteenth amendment to the constitution of the United States; that this was the main and important and controlling question presented to the Supreme Court of the state of South Dakota for determination, and the final judgment of the said Supreme Court of the state of South Dakota is to deny a federal right or immunity, specially set up and claimed and which, if recognized and enforced, would require a judgment different from one resting upon the ground of local or general law.

Fifth: Said Supreme Court of the state of South Dakota erred in affirming the judgment of the said Circuit Court of Lincoln county, and the said Circuit Court of Lincoln county erred in rendering judgment over objections of plaintiff in error duly made upon the hearing of the motion for judgment upon the verdict in double the amount of the same and in a sum double the actual damages sustained; that plaintiff in error urged the unconstitutionality of Chapter 215 of the Session Laws of the state of South Dakota for the year 1907,

wherein said law provides for the recovery of double damages or double the amount of the actual damages sustained, and particularly in this; that defendant in error seeks by means of said law to deprive plaintiff in error of its property without due process of law; that said law denies to plaintiff in error the equal protection of the laws; that said law is repugnant to the fourteenth amendment to the constitution of the United States, and that defendant in error seeks thereunder to deprive plaintiff in error of its property without due process of law, and thereunder plaintiff in error is denied the equal protection of the laws; that the enforcing of said law will amount to the taking of the property of plaintiff in error without just compensation and is in violation of the protection guaranteed the plaintiff in error by the fourteenth amendment to the constitution of the United States; that said Circuit Court erred in making and entering a judgment for double the amount of the verdict and in an amount double the actual damage sustained, and the Supreme Court of the state of South Dakota in affirming and approving said order and judgment and ruling of the said Circuit Court of Lincoln county, erred for the reasons therein duly specified and affirmed.

Sixth: For all the reasons hereinbefore specified and assigned, the judgment of the Circuit Court of Lincoln county, fixing the damages in double the amount of the verdict and double the amount of actual damages, and the judgment of the Supreme Court of the state of South Dakota, are erroneous and contrary to law, and contrary to the fourteenth amendment to the constitution of the United States, and in violation of the federal rights or immunities guaranteed by the constitution of the United States to the said plaintiff in error, and each should be vacated and set aside, and the said Supreme Court of the state of South Dakota should have reversed said judgment and the order granting and allowing defendant in error to take judgment in a sum double the amount of the verdict and double the actual damages sustained by defendant in error.

Wherefore plaintiff in error prays that said judgment and the decision of the Supreme Court of the state of South Dakota may be reversed and set aside and annulled, and that the said plaintiff in error may be restored to all things which it hath lost by the action and because of said decision and judgment. (Record pp. 44-48.)

Thereafter plaintiff in error caused said statement of errors

to be duly served upon the defendant in error. (Record pp. 48-49.)

THE STATUTE OF SOUTH DAKOTA REQUIRING RAILROAD COMPANIES TO PAY DOUBLE DAMAGES IN CERTAIN CASES

AN ACT Requiring Railroad Corporations to Pay Double the Amount of Damages Incurred from Loss of Property, Injured or Destroyed by Fires Communicated by Locomotive Engines, or from the Burning of Grass, Weeds or Rubbish on Right of Way by Employes of such Corporations, in Certain Cases.

Be it Enacted by the Legislature of the State of South Dakota:

Sec. 1. Duty of Railroad Companies] Each railroad corporation owning or operating a railroad in this state, shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, or by the burning of grass, weeds or rubbish on right of way by employes of such corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages.

Sec. 2. Settlement Within Sixty Days] Whenever the property owned by any person or corporation shall be injured or destroyed by fire communicated by locomotives in use upon any railroad owned or operated by a railroad corporation, or by the burning of grass, weeds and rubbish on the right of way by employes of such corporation, so as to render the railroad corporation liable, under Section 1 of this act, or otherwise, the owner of such property injured or destroyed may recover damages for such loss, and to recover the same it shall only be necessary for him to prove the loss of or injury to his property. If such corporation fails or neglects to pay such damage within sixty days after notice in writing that a loss or injury has occurred, accompanied by an affidavit thereof, served upon any officer or station or ticket agent employed by such corporation in the county where such loss or injury occurred, such owner shall be entitled to recover from the corporation double the amount of damages actually sustained by him in any court of competent jurisdiction. If such company shall, within sixty days, offer in writing to pay a fixed sum, being the full amount of the damages sustained,

and the owner shall refuse to accept the same, then in any action thereafter brought for such damages when such owner recovers a less sum as damages than the amount so offered, then such owner shall recover only his damages, and the railway company shall recover its costs.

Approved February 25, 1907.

BRIEF OF ARGUMENT

It may be conceded and regarded as well settled that the legislature, by virtue of its police powers, under the constitution, has a right, for the proper protection of individuals and their property, to prescribe certain special duties for such as are engaged in a peculiarly and distinctly hazardous business or employment, and that the legislature may, in order to adequately enforce the performance and observance of such duties, impose a certain penalty for failure, either negligently or willfully, to obey and comply with the same.

The act does not impose a penalty for the violation of any duty, or for negligence, or for loss caused by fire regardless of negligence; the penalty is for delinquency in the payment of certain obligations and is imposed on railroad corporations alone, for the right to a trial. The object of the statute involved in this action is to impose a penalty for failure to pay a debt within a certain time. The Supreme Court of South Dakota so construed it, and that court having given the statute such construction, this court will adopt it as the proper construction, following the decisions of this Court in that respect. The effect of the statute is to penalize the defense of the railroad company against what the result palpably shows to have been an excessive claim, and is, therefore, repugnant to the fourteenth amendment of the Constitution of the United States. This arbitrary imposition of a penalty is tantamount to the taking of the property of the railroad corporation without due process of law, and, if followed to the last extremity, ultimate confiscation thereof. The said law and the provisions thereof deny to plaintiff in error the equal protection of the laws, which is likewise repugnant to the fourteenth amendment to the constitution of the United States.

I

Law unconstitutional in that it imposes a penalty for delinquency in payment of a debt.

First: Section 2 of Chapter 215 of the Session Laws of South Dakota for the year 1907 is unconstitutional, in that it imposes a penalty for delinquency in the payment of a debt and for the privilege of a trial, railroad companies alone being singled out as a certain class of debtors and subjected to oppressive discrimination, and being arbitrarily classified to suffer this penalty. Section 1 of the act in question is merely declaratory of the common law and in so far that it declares a liability for actual damages sustained, it is purely remedial in its nature and not penal.

U. P. Ry. Co. v. De Busk (Colo.), 20 Pac. 752, 759;
Wadsworth v. U. P. Ry. Co. (Colo.) 33 Pac. 515.

If such a statute were made penal, regardless of a violation of any duty, it would be unconstitutional.

County of San Mateo v. So. Pac. R. Co. (Cal.), 13 Fed. 722-782 and note; cited also as "the Railroad Tax Cases," opinion by Field, Justice. (Sawyer, C. J., specially concurring.)

It may be observed that a comparison of the stock killing and fire cases strikingly exemplifies the distinction in the law where the act is penal and where it is purely remedial. Statutes attempting to impose an absolute liability, regardless and irrespective of a violation of any duty for killing stock, being penal, have invariably been held unconstitutional.

Denver & R. G. Ry. Co. v. Outcalt, 2 Col. App. 395;
Hurtando v. California, 110 U. S. 535-537;
St. L. I. M. & S. Ry Co. v. Wynne (Ark.) 224 U. S. 354;
Seaboard Air Line v. Seegers, 207 U. S. 73;
Jolliffe v. Brown, 14 Wash. 155;
Black v. M. & St. L. Ry. Co. (Ia.), 96 N. W. 984;
Atchison, T. & S. F. R. Co. v. Matthews (Kan.) 174 U. S. 96;
Grand Island W. C. R. Co. v. Swinbank (Neb.) 71 N. W. 48-50;
Gulf, Col. & S. F. Ry. Co. v. Ellis, 165 U. S. 150;
Stupeck v. U. P. Ry. Co. (Col.), 200 Fed. 192.

The validity of a statutory provision for attorney's fee in the nature of a penalty, was first presented, and this court was first called upon to consider the question, in Gulf C. & S. F. Ry Co. v. Ellis, supra, which was brought for the killing of a colt by a railroad and in which it was held that a statute of Texas which allowed an attorney's fee of $10.00 to successful plaintiffs in actions upon certain classes of claims against railroad companies, not exceeding $50.00 in amount, which

the company should omit to pay within a certain time after presentation, was invalid. The court, speaking through Mr. Justice Brewer, said:

"It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them when for like delinquencies it punishes no others."

"* * * But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the state, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency."

In Atchison, T. & S. F. R. Co. v. Matthews, supra, the court, in referring to and commenting upon the Ellis case, said:

"While the right to classify was conceded, it was said that such classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted; that no mere arbitrary selection can ever be justified by calling it classification. And there is no good reason why railroad corporations alone should be punished for not paying their debts."

In the *Matthews* case, supra, and in the case of Mo. Pac. R. R. Co. v. Merrill (Kan.), 19 Pac. 798, and kindred cases, the statutes allowing the plaintiff in case of recovery a reasonable attorney's fee, were upheld. It will be noticed, however, that the acts construed in those cases did not, like Section 1 of the act in question and under consideration, impose an absolute liability, regardless of a violation of a duty. In those acts the gist of the action was negligence; under this act liability is absolute. While a penalty might be imposed

where there is negligence, it cannot be imposed regardless of negligence; for in the one case the penalty is justifiable, whereas in the other it is arbitrary. In the construction of this class of statutes the question is whether, or not, the statute is penal or remedial. If it be penal, the penalty must be for the violation of some duty. There can be no punishment where there is no offense. It cannot escape one's notice that the statute involved in the *Matthews* case, supra, did not create an absolute liability, and it was held by the court in that case that the purpose of the statute was not to compel the payment of debts, but to secure the utmost and highest care on the part of railroad companies to provide against and to prevent the escape of fire from their moving locomotives and train. If the purpose of that statute had been to impose a penalty upon the railroad company for not paying damages claimed, doubtless a different conclusion would have been reached in that case. Contrasting the statute of South Dakota in question with that of Kansas, one cannot fail to observe that the former endeavors to impose penalties that are onerous and even outrageous and is so arbitrary that it cannot be treated and regarded as entitled to the same construction as put upon the Kansas statute. In the *Matthews* case an opportunity was given to make proof as to whether the fire was set out through the negligence of the company, or not, and in that case the penalty sought to be imposed was only after the company had been found guilty of negligence. In the instant case the statute in question imposes penalties where fires are set out without regard to negligence on part of the railway company, or its employes. Therefore, we say an undue and unfair and unjust punishment is sought to be visited upon the railway company under the South Dakota statute, where it has admittedly committed no wrong and violated no duty.

In Jolliffe v. Brown, supra, the court held that legislation imposing a penalty in addition to actual damages can be sustained only where the party on whom the penalty is imposed is in fault or guilty of a wrong.

In Denver & R. G. Co. v. Outcalt, supra, the court held that the measure of damage is the value of the animal as appraised, and if the money is withheld for an unreasonable time, interest upon the amount. Double the amount of actual damage can only be sustained as punitive damage—a penalty; for the violation of law involving criminal intention or moral obliquity. Anything further is repugnant to the constitution and the well settled maxims of the common law.

The difference between the fire and stock killing cases is only this: In the stock killing cases, no absolute liability can be imposed, regardless of a violation of any duty, because such statute would be penal; in the fire cases, an absolute liability may be imposed for actual damages sustained, because such statute is merely declaratory of the ancient common law, and is purely remedial, on the principle that when one of two equally innocent persons must suffer, the loss should be borne by him who moved the cause. When, in a fire case, in addition to an absolute liability for the actual damages sustained, an absolute penalty is imposed, regardless of a violation of any duty, such statute becomes penal, and, like the stock killing cases, is unconstitutional.

It is believed that no case can be found where a penalty was imposed beyond the actual damages sustained, regardless of a violation of any duty. But whatever distinction there may be between the fire and stock killing cases, that distinction is not material in this case, for the act in question does not impose the penalty for damages sustained by fire, but for the failure to pay certain debts in certain cases within a specified period.

In the acts construed in the Matthews and kindred cases, the attorney fee was made part of the damages sustained from the fire. There it was a charge, not for failure to pay the debt within a specified period, but for permitting the fire in the operation of the railroad to cause damage. In those acts the statement was not "Pay this debt at your peril within sixty days after notice, for if you fail so to do, whether you honestly question the justice of the debt or not, you will pay twice the amount, should you not succeed in establishing your defense and every part thereof!" There the statement is: "Use due care in your use of a hazardous element, for if you are negligent and the plaintiff establishes your negligence, you will pay, in addition to the actual damages sustained, a reasonable attorney's fee," or such other penalty as may be prescribed.

While the court in the case of Seaboard Air Line v. Seegers, supra, held valid a statute imposing a penalty; yet, that is readily distinguishable from other cases holding such a statute invalid and unconstitutional. That case was one where the statute provided for the imposition of a penalty upon the common carrier of $50.00 for failure to adjust and pay the claim. It was also further provided in the statute under consideration in that case that unless the claimant should recover in the action the *full amount claimed*, no pen-

alty should be recovered and the only amount that could be recovered would be the *actual amount* of *damages*, or loss, with interest. The decision took into account the peculiar phraseology of the statute under consideration. The court expressly said that the statute under consideration in that case "was not primarily to enforce the collection of debts, but there are limits beyond which penalties may not go, even in cases where the classification is legitimate, but that the court was not prepared to hold that the amount of penalty imposed is so great or the length of time within which the adjustment and payment are to be made is so short that the act of imposing the penalty and fixing the time is beyond the power of the state." Mr. Justice Peckham dissenting. We think that if the South Dakota statute in question were then under consideration by the Supreme Court of the United States, a far different holding would have been made. Under the South Dakota statute the claimant may make his demand in as exorbitant an amount as he chooses, but if the company fails to make an offer and to pay the same, and fails to offer *even to a cent*, the amount the jury may declare the damages to be, the railway company is penalized in the amount double the actual damages found by the jury. If there had been a provision in the act that unless the claimant should recover the full amount claimed of the company, no penalty should be attached, there might be some justice in upholding the law. Practically enforcing this statute, the railroad company would be compelled to pay double damages in every case, the tender by the company making it absolutely certain that no *less* sum would ever be recovered by a claimant. The statute says:

"If such company shall within 60 days offer in writing to pay a fixed sum, being the full amount of the damages sustained, and the owner shall refuse to accept same, then in any action thereafter brought for such damages, when such owner recovers a less sum as damages than the amount so offered, then such owner shall recover only his damages and the railway company shall recover its costs."

We think it is impossible to carry out the terms of this statute so far as the railroad company is concerned. The only real way, it seems to us, would be, in order to escape the penalties, to concede to the demand of claimant and pay the same within 60 days, otherwise we would be compelled to take the chance of a heavy penalty if the company fails to tender in settlement the exact amount even to a cent which the jury shall find to be the actual damages. It seems to us that such a statute is properly characterized in the language

of the court in Grand Island W. C. R. Co. v. Swinbank, supra, at page 50, namely:

"It is a sort of a hybrid between a display of ethical indignation and the imposition of a criminal fine."

Our position is sustained in Black v. M. & St. L. Ry Co., supra. The language of the court in that case, at page 987, is, as follows:

"It is further contended, with reference to the pigs, that there was no evidence of the value on which to predicate the recovery of double damages. But in one division of defendant's answer, relating to this cause of action, it is averred that defendant 'tenders to the plaintiff the sum of thirty-five dollars, which the plaintiff claims to be the value of the pigs, and it denies each and every other allegation in the said count of the said petition contained.' And counsel for defendant, in his opening statement, said, 'We come into court and tender Mr. Black, not the value that we claim that the pigs were, but the value he himself places upon the pigs, namely, thirty-five dollars.' Counsel's contention now seems to be that, while this tender relieved plaintiff of the necessity of proving the value of the pigs for the purpose of recovering simple damages, it did not afford the basis for the recovery of double damages. But the distinction is so subtle that we have been unable to grasp it. The plaintiff is entitled to double damages, provided he shows the statutory notice and affidavit, and failure of the railroad company to pay within 30 days; and, if the admission is sufficient to establish the value for the purpose of recovering simple damages, certainly no more evidence of value was necessary in order to entitle plaintiff to recover double damages. A payment of money into court during trial, even without a plea of previous tender, operates as a tender from that date, and admits so much of the cause of action. Ye Seng Co. v. Corbitt (D. C.) 9 Fed. 423."

In the instant case defendant in error filed a notice accompanied by an affidavit of claim in the sum of $550.00 for damages (Record p. 7). The amount sued for herein was the sum of $1,600.00, $800.00 being actual damages claimed and $1,600.00 double that amount as damages demanded. (Record p. 4.) A verdict was rendered for the sum of only $100.00, (Record p. 8), thereby showing that the claim of defendant in error was exorbitant and very excessive.

We think the case of St. L. I. M. & S. Ry. Co. v. Wynne, supra, is on all fours with the case at bar. The court held that

a statute imposing attorney fees and double damages as applied where the recovery was for less than the amount demanded in the notice and demand, is wanting in due process of law and repugnant to the fourteenth amendment of the constitution of the United States.

Applying the doctrine of that case to the facts in the instant case, where demand was made for $550.00, actual damage claimed in suit $800.00, judgment demanded $1,600, and verdict returned for $100.00, there can be but one conclusion and that Chapter 215 of the Session Laws of South Dakota for the year 1907 is wanting in due process of law and repugnant to the fourteenth amendment to the constitution of the United States.

II

It discriminates against one class of litigants in favor of another, denying to plaintiff in error equal protection of the laws.

The act in question discriminates against one class of litigants in favor of another and clearly denies to plaintiff in error the equal protection of the laws. Such an attempt to grant special advantages to one class of litigants at the expense of another is unconstitutional. We cite the following cases in support of this proposition:

Jolliffe v. Brown, 14 Wash. 155;
Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 395;
R. R. Co. v. Moss, 60 Miss. 641;
Wilder v. Chicago & N. W. Ry Co. 70 Mich. 382;
Colting v. K. C. Stock Yds. Co. 183 U. S. 79;
Hocking Valley Coal Co. v. Rosser, 52 Ohio St. 12;
Calder v. Bull, 3 Dall. 387, 388;
Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150;
Builders' Supply Depot v. O'Connor, 150 Cal. 265;
South & North Ala. R. Co. v. Morris, 65 Ala. 193;
Williamson v. Liverpool, L. & G. Ins. Co. (Mo.) 105 Fed. 31;
Coal Co. v. Rosser, 53 Oh. St. 22-4.

In Builders' Supply Depot v. O'Connor, supra, it was held by the Supreme Court of California that

"A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action, and not in other kinds of actions where, as in the statute here in question, the distinction is not

founded on constitutional or natural difference is clearly violative of the constitutional provisions above noticed."

It will be observed that in most of the cases here referred to, the objectional feature of the several acts was the imposition of a reasonable charge of attorney fee on the unsuccessful litigant, which was construed as a penalty. The case at bar is much stronger in favor of the plaintiff in error than any of those cases, for the reason that a statute charging an unsuccessful litigant with an attorney fee, might possibly be construed as imposing not strictly a penalty, but rather a charge in the nature of costs. In this case we have no such difficulty to surmount. The penalty imposed is not to be part of the "costs" for an attorney fee, or any other expense in the litigation, but for a fine.

In Chicago, St. L. L. & N. O. R. Co. v. Moss, supra, a statute which imposed upon an unsuccessful appellant, a reasonable attorney fee incurred by reason of taking an appeal from a decision rendered by a justice of the peace in a suit against railroad companies for damages to live stock, notwithstanding it gave the same right to both parties, was held to be unconstitutional in that it denied equal protection under the law.

In South & North Ala. R. Co. v. Morris, supra, a similar statute was adjudged unconstitutional. It was there said:

"Justice cannot be sold or denied by the enaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price, nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right, by the imposition of arbitrary, unjust and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial, and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions."

In Wilder v. Chicago & W. M. R. Co., supra, the court held that a statute providing for the asssessment of a $25.00 additional attorney fee, in case the plaintiff is successful, where no like costs is allowed to the defendant, is a penalty and not costs, and as such is repugnant to our form of government

and out of harmony with the genius of our free institutions, that the same is, therefore, unconstitutional and void.

In Hocking Valley Coal Company v. Rosser, supra, a statute providing for attorney fee in case payment of wages is not made within three days after written demand therefor, is declared unconstitutional.

In Colting v. K. C. Stock Yds. Co., supra, the court holds unconstitutional an act applying only to the K. C. Stock Yds. Co. and not to other companies or corporations engaged in like business, upon the ground that under its operation such company is denied equal protection of the law, and declares any law which places upon a litigant as a penalty for a failure to make good his claim or defense a burden so great as to practically intimidate him from asserting that which he believes to be his rights is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws. In the Colting case the Supreme Court of the United States illustrated the evil of the penalty in the Kansas law by supposing in fancy a statute which in its provisions is almost parallel with the South Dakota statute involved in the case at bar, and referred to such supposed statute as an extreme illustration, evidently not believing that any legislature would enact a statute containing such extreme and arbitrary provisions. Here we have the reality! The act in question does charge that if this railroad corporation defend this action, it should be punished by a fine equal to half of the amount of the claim, and, indeed, to the whole thereof; and this law does, by its terms, apply only to railroad corporations. Should there be the slightest hesitation in holding that this corporation is denied the equal protection of the laws? The fact that the courts are open to hear its defense is not sufficient, if upon railroad corporations and railroad corporations alone, there is visited a substantial penalty for a failure to make good their entire defense.

In the case of Gulf, etc., R. Co. v. Ellis, supra, it was held that corporations are persons within the provisions of the fourteenth amendment to the constitution of the United States, and that a state has no more power to deny to corporations the equal protection of the law than it has to individual citizens. While it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference in situation of circumstances, that naturally suggests the justice of diverse legislation with respect to the object classified. Clas-

sification should not be made arbitrarily and without any such basis.

III

The law in its operation is unjust, inequitable and pernicious.

To sum up, we urge and contend that the outrage perpetrated by this statute is convincingly established by the facts in the instant case. The damage being peculiarly within the knowledge of the claimant, and within his knowledge alone, the amount and value thereof is to be determined by him, and the railroad corporation must necessarily accept or reject his statement of the amount and value of the loss and damage at its peril.

There is no duty *first* imposed upon the railroad corporation—the only duty is that *after* loss and damage, wholly unavoidable and without negligence. Then the railroad corporation sets about to ascertain the actual value of the property lost or destroyed, the value of which is peculiarly within claimant's own knowledge. How difficult for the railway company! It is embarking on a sea of uncertainty and must venture a guess as to the value of the loss or damage. If claimant recovers a sum *less* than claimed, but recovers *just the amount* offered by the railway corporation, yet the company must pay double the amount and thereby be penalized. Claimant may offer no evidence as to value, but rely on the offer of the railroad corporation, and then that amount must be doubled, and thus it is apparent there never would be a case where a railroad corporation would not be liable and required to pay double damages under the statute in question. What a rank injustice! The railroad company can only escape the payment of double damages provided by the act by making a tender and offer to the owner of the property lost or destroyed, of an amount in excess of the actual damages sustained by him. The statute does not provide that the railway corporation then pay the owner his actual damages in settlement of the claim, a right and privilege accorded to every other party or litigant. To illustrate: A suffers damage by fire set out by a locomotive. The amount of his damage is peculiarly within his own knowledge, and he fixes the amount at his own pleasure. The railroad company, on presentation of the claim, must either pay or decline payment. After investigation on its part it cannot escape liability for double damage by tendering to the claimant the full amount of his loss, as the statute allows him

double damages in all cases except where he recovers a verdict for *less than the amount tendered.* The result is that the railroad company, after ascertaining the actual damage which the claimant has suffered, must, in making a tender or offer, make a donation to him of a part of its property, or suffer double damages at the hands of the court, and this, it should be borne in mind, without any wrong doing or negligence upon the part of the railroad company, but after it had taken every precaution known to the railroad world to avoid inflicting the injury of which complaint is made. It seems to us that such a statute is plainly at war with every principle of natural justice, which it is the aim of all courts to administer. In other words, the statute in question denies to the railroad corporation the right to defend against an excessive demand, except upon the condition that the railroad corporation shall submit to the arbitrary imposition of a penalty by way of double damages in case it has not, before the trial of the case, tendered to the defendant a larger amount than the jury finds is the actual damage which is sustained, thereby denying to the railroad corporation free access to the courts, which is allowed and permitted to opponent and claimant. It is conceded that fires will escape from railway locomotives regardless of all efforts to prevent. It must be further conceded that no duty can be imposed upon a railroad company to perform the impossible. It should be remarked that the statute makes no distinction between a fire negligently set out and one caused regardless of every precaution to prevent it, and the penalty of double damages is imposed in the former as well as in the latter instance. Further, defendant in error demanded for his damage the sum of $550.00, which sum, by the verdict of the jury in this case, has been proved to be just five and one-half times the amount of the actual damage sustained.

It is conclusive, then, that the refusal of plaintiff in error to pay the sum demanded was justifiable, and that its defense was meritorious. There was, in fact, much better reason for the corporation's defense than for plaintiff's action; but under this statute the appellant must pay a penalty either way. In the instant case, if plaintiff in error had paid the amount demanded, the penalty would equal four and one-half times the amount of actual damage sustained. If plaintiff in error had paid the full demand of the complaint, it would have paid as a penalty fifteen times the amount of actual damages. For resisting such penalty, the plaintiff in error must pay twice the amount of the actual damage sustained. It would seem that a claimant who makes an honest

claim and is paid, receives only the amount of his damages, but that a plaintiff who demands five and one-half times his due, may recover twice the amount of his actual damage, if the corporation refuses to accede to his demand.

Finally, we most strongly urge and contend that neither of the sections of the act can be sustained. Even if it should be held that the sections are separable, the elimination of either will, we think, not save the other. The subject of section one is not expressed in the title and must, therefore, fall. The elimination of section one will not cure, in our judgment, the defect in section two, which is, as we have heretofore and throughout this brief contended, an unwarranted imposition of a penalty without due process of law and without the equal protection of the laws.

Wherefore plaintiff in error prays that the judgment and decision of the Supreme Court of the state of South Dakota be in all things reversed, annulled and altogether held for naught, and that it be restored to all things which it has lost thereby, as well as by the said judgment and decision of the Circuit Court of Lincoln county, and for such further relief in the premises as may be just and proper.

Respectfully submitted,

BURTON HANSON,
WILLIAM G. PORTER,
ED. L. GRANTHAM,
Counsel for Plaintiff in Error.

CITATION OF AUTHORITIES

The act is unconstitutional in that it imposes a penalty for delinquency in the payment of a debt.

A. T. & S. F. Ry. Co. v. Matthews (Kan.), 174 U. S. 96;
Black v. M. & St. L. Ry. Co., 122 Ia. 32;
County of San Mateo v. S. P. R. Co. (Cal.), 13 Fed. 722-782;
Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 187;
Grand Island & W. C. R. Co. v. Swinbank, 51 Neb. 521;
Gulf, Calif. & S. F. Ry. Co. v. Ellis, 165 U. S. 150;
Hurtando v. California, 110 U. S. 535-537;
Jolliffe v. Brown, 14 Wash. 155;
Railroad Tax Cases, 13 Fed. 722-782;
St. L. I. M. & S. Ry. Co. v. Wynne (Ark.), 224 U. S. 354;
Stupeck v. U. P. R. Co., 200 Fed. 192;
Seaboard Air Line v. Seegers, 207 U. S. 73;
Wadsworth v. U. P. Ry. Co., 19 Colo. 600.

The act is unconstitutional in that it discriminates against one class of litigants in favor of another, denying to plaintiff in error equal protection of the laws.

Coal Company v. Rosser, 53 Oh. St. 22-24;
Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641;
Colting v. K. C. Stock Yds. Co., 183 U. S. 79;
Hocking Valley Coal Co. v. Rosser, 52 Oh. St. 12;
S. & N. Ala. R. Co. v. Morris, 65 Ala. 193;
Williamson v. Liverpool L. & G. Ins. Co., 105 Fed. 31;
Wilder v. C. & N. W. Ry. Co., 70 Mich. 382.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* KENNEDY.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 246. Submitted March 9, 1914.—Decided March 16, 1914.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Polt, ante,* p. 165, followed to the effect that the statute of South Dakota of 1907, c. 215, making railroad companies liable for double damages in case of failure to pay a claim or offer a sum equal to what the jury finds the claimant entitled to, is unconstitutional under the due process clause of the Fourteenth Amendment.

28 So. Dak. 94, reversed.

THE facts are stated in the opinion.

Mr. Burton Hanson, Mr. William G. Porter and *Mr. E. L. Grantham* for plaintiff in error.

No brief filed for defendant in error.

Memorandum opinion by direction of the court by MR. CHIEF JUSTICE WHITE.

The ground upon which it is asserted in this case that the statute of the State of South Dakota, upon which the judgment of the court below here under review was based, is repugnant to the Constitution of the United States, was considered and held to be well taken in a case decided this term. (*Chicago, M. & St. P. Ry. Co.* v. *Polt*, *ante*, p. 165.) As that decision is conclusive upon all the issues here presented and establishes that the statute in question is inconsistent with the Constitution and void, it results that for the reasons stated in the case referred to, the judgment in this case must be reversed and the case remanded to the court below for further proceedings not inconsistent with this opinion.

Reversed.